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Supreme Court, U.S.
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In The

Supreme Court of the United States

INTERCITY MAINTENANCE CO.,

Petitioner,

v.

LOCAL 254, SERVICE EMPLOYEES INTERNATIONAL UNION; SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR LIMA; DONALD COLEMAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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119 pp

QUESTIONS PRESENTED

I. Whether Intercity's State Law Defamation Claims Are Preempted Pursuant to *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S. Ct. 657 (1966) Where the Lower Courts Found That the Union Acted With Actual Malice?

II. Where the Lower Courts Found That the Union Published Defamatory Statements About Intercity With Actual Malice, Does *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S. Ct. 657 (1966) Require Proof of Special Pecuniary Losses In Addition to Damages Recoverable Under State Tort Law?

III. Upon Proof of a Union's Malicious Libels, Does General Injury to Intercity's Reputation, Entitling It to Presumed Damages Under State Tort Law, Satisfy the Compensable Harm Requirement of *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S. Ct. 657 (1966), Permitting an Award of Punitive Damages?

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PETITION FOR WRIT OF CERTIORARI

Intercity Maintenance Company ("Intercity") respectfully petitions for writ of certiorari to review the decision and judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit giving rise to this petition is reported at 241 F.3d 82 (2001). It is reprinted in the Appendix ("App.") hereto at App. 1. The decision of the United States District Court for the District of Rhode Island granting the Defendants' Motion for Judgment as a Matter of Law is not reported. (App. 18). The initial decision of the United States District Court for the District of Rhode Island granting in part and denying in part the Defendants' Motions for Summary Judgment is reported at 64 F. Supp. 2d 483 (1999). (App. 26).

JURISDICTION

On April 11, 2000, the United States District Court for the District of Rhode Island issued a bench decision granting the Motion for Judgment as a Matter of Law of Defendants Service Employees International Union, Local 254 and Donald Coleman with respect to Intercity's claims. Judgment was entered by the District Court on April 11, 2000. (App. 25). On April 12, 2000, Intercity filed

its notice of appeal to the United States Court of Appeals for the First Circuit. In an opinion filed on March 2, 2001, the First Circuit affirmed the ruling of the District Court with respect to Intercity's defamation claims and entered its judgment on March 2, 2001.[1] Pursuant to Supreme Court Rule 13 (1), this petition has been filed within ninety (90) days of the entry of judgment.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED IN THIS CASE

This case involves the National Labor Relations Act, as amended, 29 U.S.C. § 158 ("NLRA") (reprinted at App. 78), as construed by *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S. Ct. 657 (1966) and the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA") (reprinted at App. 90).

STATEMENT OF THE CASE

Intercity is a small, family-owned, non-union corporation providing janitorial services. It was formed in 1988 by its president, Michael Bouthillette ("Bouthillette"). In 1995, Intercity was pursued by Local 254 of the Service Employees International Union ("Local 254") seeking to

[1] The First Circuit reversed the ruling of the District Court on Intercity's claims of unlawful secondary activity and remanded the case for a new trial. (App. 16).

organize Intercity's workers. Intercity rebuffed Local 254's demands for voluntary recognition and insisted that Local 254 seek representational status through the National Labor Relations Board. In response, Local 254 began a ruthless campaign of intimidation and threats against Intercity, Bouthillette and his family members. Local 254 also distributed defamatory letters and handbills to Intercity's largest customers, Blue Cross/Blue Shield of Rhode Island ("Blue Cross") and Women & Infants Hospital ("WIH"). (Samples of said letters and handbills are reproduced at App. 92). The defamatory documents conveyed vicious, grave and false accusations that Intercity exposed its workers to unsafe and unsanitary working conditions as well as chemical and biological hazards, including HIV and the Hepatitis B virus.

Local 254 sent two letters to Blue Cross accusing Intercity of mistreating and endangering the health and safety of its workers, stating that *"a health emergency exists,"* that Intercity was in violation of federal and state laws and that Intercity had failed to protect its workers from sickness and hazards caused by chemical contamination. These assertions were presented as factual representations of Intercity's health and safety record. They were patently false because Intercity provided all necessary manuals, training, protective gear and clothing to its workers.

In trial testimony, agents of Local 254 admitted they informed Intercity in March 1995 that they no longer sought to organize Intercity's employees. Instead, Local 254 cavalierly admitted that their goal was to run Intercity out of business by causing it to lose all of its customers.

On March 31, 1995, Local 254 began picketing and handbilling another of Intercity's primary customers, WIH, carrying signs and handing out leaflets to customers, patients and other persons passing by the hospital. The picketing continued for five days. One of the handbills distributed in front of WIH proclaimed:

> INTERCITY HAS INFECTED ITS CLEANERS AS FOLLOWS:
>
> INTERCITY DOES NOT PAY LIVING WAGES
> INTERCITY DOES NOT PAY HOLIDAY PAY
> INTERCITY DOES NOT PAY HEALTH INSURANCE
> INTERCITY EXPOSES ITS WORKERS TO CHEMICAL AND BIOLOGICAL HAZARDS INCLUDING HIV AND HEPATITIS B.

Local 254 published these proclamations as statements of fact. But at trial, the evidence exposed their blatant falsity because Intercity: (1) paid its workers wages above area standards; (2) provided its workers with paid holidays, health insurance, vacations, bonuses and low interest loans; and (3) met requisite health and safety protocols.

Of critical and prominent import to this petition is the lower courts' adjudication that Local 254 acted with *actual malice* in publishing the false, defamatory letters and handbills.[2] The District Court expressly found:

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[2] The questions presented in this petition have never been squarely addressed by any other Court of Appeals because the courts in previous defamation cases involving labor unions premised their rulings on the determination that the actual malice test required by *Linn v. United Plant Guard Workers of America*, 383 U.S 53, 86 S. Ct. 657 (1966) had not been met. *Compare Dunn v. Air Line Pilots Association*, 193 F.3d 1185, 1197-1200 (11th Cir. 1999).

> [T]he evidence indicates that Coleman and Sullivan [agents of Local 254], and Local 254, made false statements of fact by writing letters to Blue Cross and Women & Infants, and by distributing leaflets at Women & Infants. The evidence is overwhelming that those statements were either knowingly false or made with reckless disregard for truth or falsity.

(App. 20). The District Court further concluded that:

> The plaintiff has succeeded in proving that the defendants, Local 254 and Coleman, and other employees of the Local, such as Sullivan and Lima, are lawless, marauding, disingenuous, character assassins who deserve their comeuppance.

(App. 20). These findings were accepted by the Court of Appeals.

Consequently, the defamatory nature of the published statements as well as the actual malice of the union defendants have been conclusively established for the purposes of this petition.

Local 254's defamatory publications sullied Intercity's goodwill and integrity as an employer and service provider. The resulting harm was general injury to Intercity's professional reputation, entitling it to recover presumed damages under state law. Nevertheless, the First Circuit ruled that "plaintiffs who endure even malicious libels during a labor dispute must present evidence of harm from defamation in order to recover, notwithstanding the law of states such as Rhode Island in which damages would otherwise be presumed." (App. 15). The

First Circuit further concluded that in the absence of evidence of actual damages, no punitive damages may be awarded. (App. 16). The First Circuit's decision stripped Intercity of a remedy for the general injury to its reputation. More importantly, it serves to insulate and immunize unions from responsibility for their malicious acts, contrary to federal labor policy and the rulings of this Court.

REASONS FOR GRANTING THE WRIT

I. The First Circuit's Ruling That Intercity's State Law Defamation Claims Were Preempted Pursuant To *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S. Ct. 657 (1966), Despite Its Finding That The Union Acted With Actual Malice, Conflicts With Federal Labor Policy And Decisions Of This Court Allowing Redress For Malicious Libels According To State Law.

The underlying policy of the federal labor laws cannot be furthered by protecting defamatory speech maliciously published by a labor union. No legitimate federal labor law objective is advanced by sanctioning a union's malicious libels, especially where the intent is neither to organize an employer nor to truthfully inform the public of inequitable treatment, but rather to harm the business reputation of a non-union employer.[3] This conduct is

[3] Each of Local 254's agents admitted at trial that no labor dispute existed between Local 254 and WIH or between Local 254 and Blue Cross or between Local 254 and Intercity at the time the handbills were distributed. These witnesses further

accorded no protection under federal labor law, and therefore is not governed by the NLRA or the LMRA.

This Court formulated the applicable standard for applying state defamation law in the labor context in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S. Ct. 657 (1966), reiterated in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 94 S. Ct. 2770 (1974). The dictates of *Linn* control this case:

> [T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that *malicious libel enjoys no constitutional protection in any context*. After all, the labor movement has grown up and must assume ordinary responsibilities. *The malicious utterance of defamatory statements in any form cannot be condoned*, and unions should adopt procedures calculated to prevent such abuses.

Id. 383 U.S. at 62, 86 S. Ct. at 663. [Emphasis added].

Where union statements are false and published with actual malice, that is, made with knowledge of their falsity or with reckless disregard of whether they are true or false, a union must be held accountable under state law. *Linn*, 383 U.S. at 61, 86 S. Ct. at 662; *Old Dominion*, 418 U.S. 281, 94 S. Ct. at 2779-2780.[4] In cases of malicious libel this Court has stated:

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admitted that as of March 31, 1995, the date the picketing began at WIH, Local 254 no longer sought to organize or represent Intercity's employees, but only wanted to run it out of business.

[4] This Court has equated the term actual malice as shorthand for the "knowledge of falsity or reckless disregard of

> The exercise of state jurisdiction here would be a 'merely peripheral concern of the Labor Management Relations Act,' provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that an 'overriding state interest' in protecting its residents from malicious libels should be recognized in these circumstances.

Linn, 383 U.S. at 61, 86 S. Ct. at 662.

Linn did not federalize state defamation law, but merely preempted it to a limited degree, where there was no proof of actual malice. *See Box Tree South, Ltd. v. Bitterman*, 873 F. Supp. 833, 842 (S.D.N.Y. 1995). *See also Metheney v. Monarch Rubber Co.*, 43 F. Supp. 2d 588 (S.D.W.Va. 1999) (NLRA does not completely preempt state law defamation claims); *Tosti v. Ayik*, 476 N.E. 2d 928 (Mass. 1984) (state law subject matter jurisdiction over plaintiff's libel claim not preempted by federal law).

Thus, proof of "actual malice" removes this case from the ambit of federal law. *Old Dominion*, 418 U.S. 264, 94 S. Ct. 2770 (1974) (actions under state law preempted by federal law *to the extent that* the State sought to make actionable statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth). *See Briggs & Stratton Corporation v. National Catholic Reporter Publishing Company*, 978 F. Supp. 1195, 1199 (E.D. Wisc. 1997) (state libel and slander action

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the truth" standard, applied under federal constitutional precepts, originally enunciated in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964). *Old Dominion*, 418 U.S. at 281 94 S. Ct. at 2780.

may be maintained within the context of a labor dispute where defamatory publication made with reckless disregard of truth or falsity).[5]

The applicability of the preemption doctrine under the labor laws must be read in conjunction with federal labor policy. *Linn* addressed speech uttered in the context of a labor dispute, a union organizing campaign. In following *Linn*, the Supreme Court in *Old Dominion*, stated:

> Whether *Linn's* partial preemption of state libel remedies is applicable obviously cannot depend upon some abstract notion of what constitutes a labor dispute; rather application of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated.

418 U.S. at 279, 94 S. Ct. at 2778.

In this case, the District Court concluded that "[t]he evidence is overwhelming that those statements [in the letters and handbills] were either knowingly false or made with reckless disregard for truth or falsity." (App. 20). The First Circuit likewise concluded that "Local 254 made scant effort to investigate the veracity" of the statements set forth in the letters and handbills. (App. 12). The dictates of *Linn* required that once actual malice was established, Intercity's state law defamation claims

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[5] In fact, in its initial ruling on the preemption issue, the District Court correctly found that "the key to this particular species of preemption analysis is malice," and accordingly, Intercity's state law defamation claims as well as its claim for punitive damages would not be preempted by federal labor law if actual malice was established. (App. 64).

should have been determined by the jury in accordance with Rhode Island law.

Defendants' malicious speech and unlawful objective simply cannot be said to fall within the penumbra of protected speech under the guise of a legitimate labor dispute, as such speech obviously does not further any legitimate federal labor policy. Accordingly, Intercity's defamation claims should have been analyzed with fidelity to Rhode Island tort law, which permits the recovery of presumed damages for general injury to reputation and punitive damages.

II. The First Circuit's Opinion Eviscerates *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S. Ct. 657 (1966) And Subsequent Decisions Of This Court Because The Court Required The Targeted Victim Of Malicious Libels To Prove Special Pecuniary Losses Despite Evidence Of General Injury To Reputation And The Availability Of Presumed Damages Under State Law.

Despite acknowledging *Linn's* exception to the *Garmon* preemption rule for defamatory statements made with actual malice, the First Circuit concluded that *Linn* preempts reliance on the presumption of damages allowable under state law even where actual malice has been incontrovertibly proven. (App. 13-15). This conclusion misapprehends *Linn* and is patently wrong – a plaintiff should not be required to "endure even malicious libels" without recourse to state law simply because the malicious actor is a union. (App. 15).

To superimpose a requirement of proof of specific monetary losses as a condition to recover for malicious

defamation in the labor context, will have the practical effect of licensing unions to employ an arsenal of defamatory weapons capable of destroying non-union businesses, *without any fear of repercussions.* Such an evidentiary hurdle was never mandated by *Linn.* Quite the contrary, *Linn* allowed for optional forms of proof of harm:

> [A] complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, *or whatever form of harm would be recognized by state tort law.*

Linn, 383 U.S. at 65, 86 S. Ct. at 664. [Emphasis added].

It is inherently improbable for a business smeared by a union's calculated, malicious vitriol to ascertain the identity of dissuaded customers to attest that defamatory publications deterred them from doing business. The practical reality of this case is that prospective customers simply walked away and dismissed Intercity from consideration for work. To preclude recovery in such a circumstance where injury to reputation is presumptive and obvious, would contort federal labor policy and the dictates of *Linn* (which emphasize that "malicious libel enjoys no constitutional protection *in any context*"). *Linn,* 383 U.S. at 62, 86 S. Ct. at 663. This result is manifestly unjust and simply wrong.

Linn's proof of harm requirement is not limited to proof of quantifiable pecuniary loss or special damages. Rather, proof of general injury to reputation or any other form of harm compensable under state law is sufficient. A jury may take into account probable as well as proven

injury to a plaintiff's reputation based upon the nature of the libel, the extent of the distribution, and the probable effect on the persons who may have read it. *Sheeran v. Colpo*, 460 A.2d 522 (Del. 1983).

As stated by the United States Supreme Court in *Gertz v. Welch*, 418 U.S. 323, 349, 94 S. Ct. 2997, 3012 (1974):

> Suffice to say that actual injury *is not limited to out of pocket loss.* Indeed the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although *there need be no evidence which assigns a dollar value to the injury.*

Id. [Emphasis added].

In *Linn*, the Supreme Court carefully noted the distinction between state law actions which were actionable per se and the availability of presumed damages. The Court did not foreclose the availability of presumed damages, but concluded "Linn must show that he was injured by the circulation of the statements; this necessarily includes proof that the words had a defamatory meaning." *Linn*, 86 S. Ct. 663, 383 U.S. at 58, n.2. Thus, pursuant to *Linn*, once actual malice has been established, a plaintiff is entitled to compensation for injury to its reputation where the words published by the union were defamatory on their face.

This conclusion comports with the First Amendment law of *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) and its progeny which affirm that damages may be presumed from the specific language used, so long as the actual malice standard has been met and the words are defamatory on their face, thereby implicating a person's business or professional reputation. *Gertz v. Welch*, 418 U.S. 323, 349, 94 S. Ct. 2997, 3011-3012 (1974) (holding "It is necessary to restrict defamation plaintiffs *who do not prove* knowledge of falsity or reckless disregard for the truth to compensation for actual injury).[6] *See also Caruso v. Local Union 690*, 670 P.2d 240 (Wash. 1983) (recognizing jury could award presumed damages against union where actual malice established); *International Brotherhood of Electrical Workers v. Mayo*, 379 A.2d 1223 (Md. 1977) (permitting recovery of presumed and punitive damages against union where actual malice standard met); *Hanlon v. Davis*, 545 A.2d 72 (Md. App. 1988) (same).

The language of the letters and handbills specifically targeted Intercity's business and reputation with its customers. Both the character of the words and the circumstances of the publication establish legal injury in fact, entitling Intercity to presumed damages for general

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[6] On remand, the Eighth Circuit affirmed the award of $100,000 in compensatory damages and $300,000 in punitive damages, summarizing that because there was evidence of actual malice in the publication of the defamatory statements, which were defamatory on their face, the Constitution would not prohibit presumed damages. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 540 (1982).

injury to its reputation, whether or not such damages are precisely quantifiable.

As acknowledged by the Supreme Court:

> The rationale of the common-law rules has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cases, where from the character of the defamatory words and the circumstances of the publication, it is all but certain that serious harm has resulted in fact.'

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760, 105 S. Ct. 2939, 2946 (1985). (citations omitted). Moreover, the Supreme Court has consistently recognized that presumed damages are appropriate when a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to ascertain or impossible to measure. *Memphis Community School District v. Stachura*, 477 U.S. 299, 310-311, 106 S. Ct. 2537, 2545 (1986).

Intercity proved general injury to its reputation resulting from the distribution of the defamatory letters and handbills. Bouthillette testified credibly about Intercity's reputational harm, inquiries from nurses, employees and doctors about Intercity's treatment of its workers and their conditions of employment, and the considerable efforts expended to preserve its existing customer base.

However, despite expressly finding that "Intercity presented evidence of harm to its business reputation based on statements that are defamatory on their face" (App. 14), the First Circuit concluded that Intercity could not recover compensatory damages unless it presented

evidence that Local 254's malicious accusations caused the loss of specific contracts. (App. 15-16).

The Court of Appeals' determination that *Linn* requires proof of specific or special damages in addition to proof of actual malice to recover for defamation in the labor context was erroneous. The Court confused *Linn's* requirement of proving some compensable harm as requiring proof of specific damages. (App. 15-16). The Court of Appeals failed to recognize that "special damages" in a defamation case, that is, proof of pecuniary loss apart from general injury to reputation, is required only in those circumstances where there has been slander or the words used are not defamatory on their face. Prosser, Law of Torts, § 778 (1964). This case involved libel which was defamatory on its face, as the handbills accused Intercity of infecting its workers and attacked its business reputation. Therefore, proof of special damages was not required. *Laudati v. Stea*, 44 R.I. 303, 117 A. 422 (1922); *O'Brien v. Times Pub. Co.*, 43 A. 101, 21 R.I. 256 (1899).

III. The First Circuit's Opinion Foreclosing An Award Of Punitive Damages Where A Defamed Business Has Suffered Compensable Harm Of General Injury To Reputation And Presumed Damages Under State Law Is Destructive Of Federal Labor Policy As Its Permits Unions To Publish Malicious Libels With Immunity From Liability.

In the defamation context, punitive damages are intended for the protection of the libeled individual's reputation as well as the protection against like abuse of all other persons similarly situated. *Goldwater v. Ginzburg*,

414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049, 90 S. Ct. 701 (1970).

Without the counterbalancing deterrent of punitive damages when unions cross the line into actual malice, they will continue to publish malicious libels against non-union businesses with impunity. The First Circuit's holding eliminating the availability of punitive damages to deter a union's malicious libels, must be rectified by this Court. Such a precedent effectively green-lights unbridled, malicious defamation by labor unions to the detriment of small businesses nationwide.

In *Linn* the Court held that in order to protect the objectives of federal labor policy "the defamed party must establish that he had suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages". *Linn*, 383 U.S. at 65, 86 S. Ct. at 665. Thus, all that it required for an award of punitive damages is proof of compensable harm, which may be general injury to reputation or be presumed, and proof of "actual malice" under the *New York Times* standard, as analyzed *supra*. Nevertheless, the First Circuit erroneously concluded "absent evidence of actual damages, however, no punitive damages may be awarded". (App. 16).

Intercity convincingly proved harm to its business reputation, entitling it to compensatory damages on its defamation claims. Since Intercity adduced sufficient evidence to meet both the actual malice standard under federal law and compensable harm resulting from the defamatory publications, Intercity's claim for punitive

damages should have been submitted to the jury. *Linn*, 383 U.S. at 66, 86 S. Ct. at 665.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI
UNITED STATES SUPREME COURT

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JUDGMENT ENTERED BY THE FIRST CIRCUIT COURT OF APPEALS .....App. 17

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App. 1

United States Court of Appeals,
First Circuit.

INTERCITY MAINTENANCE COMPANY,
Plaintiff, Appellant,

v.

LOCAL 254, SERVICE EMPLOYEES INTERNATIONAL UNION; SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; Victor Lima and Donald Coleman, Defendants, Appellees.

No. 00-1522.

Heard Nov. 9, 2000.
Decided March 2, 2001.

Vincent F. Ragosta Jr., with whom Matthew T. Oliverio and Christine M. Curley were on brief, for appellant.

John B. Lawlor Jr., with whom Daniel V. McKinnon and Dean J. Wagner were on brief, for appellees Local 254, Victor Lima and Donald Coleman.

Steven K. Hoffman, with whom Richard M. Peirce, Adam C. Robitaille and Christy Hoffman were on brief, for appellee Service Employees International Union.

Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and STAHL, Circuit Judge.

COFFIN, Senior Circuit Judge.

This case stems from a labor dispute in which local union officials used heavy-handed tactics in an attempt to unionize a company. Appellant Intercity Maintenance Company (Intercity), a non-union janitorial service, sued the Service Employees International Union (SEIU), its

local affiliate (Local 254), and two of the affiliate's officers, Victor Lima and Donald Coleman, for unlawful secondary activity in violation of § 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, and a variety of state tort claims, two of them alleging defamation. Summary judgment was granted to the SEIU and Lima on all counts, and to Coleman on all but the defamation claims. Local 254 went to trial on the federal claim and, along with Coleman, on the two remaining state law counts for defamation. After the close of the plaintiff's evidence, the court in a bench ruling granted defendants' Rule 50 motion for judgment as a matter of law on the three outstanding counts. We affirm the summary judgment in all respects and the Rule 50 judgment on the defamation claims, but remand the LMRA claim for retrial.

We are in full agreement with the district court's convincing resolution of the summary judgment issues and adopt its reasoning as articulated in its published opinion. *See Intercity Maint. Co. v. Local 254 Serv. Employees Int'l Union*, 62 F.Supp.2d 483 (D.R.I.1999). We therefore focus our review on the Rule 50 judgment granted at trial. Our brief recitation of the pertinent facts is culled from the district court's ruling, as well as relevant trial testimony, and presented in the light most favorable to Intercity. *See Russo v. Baxter Healthcare Corp.*, 140 F.3d 6, 8 (1st Cir.1998).

Background

Intercity provided janitorial services to Women and Infants Hospital (Women & Infants) and Blue Cross/Blue

Shield (Blue Cross) in Providence, Rhode Island, since 1989 and 1990, respectively. Beginning in late 1994, Local 254, acting through its director of organizing, Coleman, and his assistant, Lima, made repeated attempts to persuade Intercity to unionize its eighty employees and let Local 254 be their collective bargaining representative. Intercity President Michael Bouthillette rebuffed these overtures, refusing to sign the proposed collective bargaining agreement because, he said, it was up to his workers, not him, to decide whether to unionize.

In January and February 1995, Lima repeatedly warned Bouthillette to sign the collective bargaining agreement, or else Local 254 would drive Intercity out of business by picketing in front of its two major customers, Women & Infants and Blue Cross.[1] On March 28th, Coleman reiterated this threat to Blue Cross attorney Gary St. Peter, who testified that Coleman had told him he would throw up a picket line in front of Blue Cross "whether . . . it's illegal or not."

On March 20, 1995, Coleman sent two letters to Blue Cross's director of facilities management, John Leite, who was in charge of procuring janitorial services. The first letter, addressed to Bouthillette and copied to Leite, accused Intercity of violating federal and state laws and regulations in handling hazardous substances, and demanded information about Blue Cross's ventilation

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[1] The threats made against Bouthillette personally were such that the Rhode Island Superior Court granted him a temporary restraining order, enjoining Lima from contacting him or his family.

system. The second letter, sent the same day directly to Leite, requested the same information from Blue Cross.

On May 5th, Blue Cross put its cleaning services contract out to bid, and Intercity lost it to a unionized bidder. Bouthillette testified that the bid Intercity submitted, $6,597 per month, was the same price it had charged since 1990 when it first started the Blue Cross account. Bouthillette also testified that Leite had told him "we're going to go with the union contractor, and if you can resolve things with [Local 254], there's a good chance you'll get [the contract] back, but if not. . . . if you don't, there's not much of a chance." At one point, Lima told Bouthillette that Local 254 no longer wanted to organize his workers; it just wanted to drive Intercity out of business. By August 1995, Intercity was no longer servicing Blue Cross.

Local 254 did not limit its interference with Intercity's customers to Blue Cross. On March 31, 1995, Local 254 began a week-long picket line outside of Women & Infants, distributing printed handbills that contained grave accusations, including false references to Intercity not providing health insurance or holiday pay to its employees and paying less than the prevailing wage. In fact, Intercity did provide those benefits and paid its employees more than the union wage contemplated in the proposed collective bargaining agreement. Bouthillette testified that his contact at Women & Infants, Mark Neal, told him on the day picketing started, "We can't have this here. . . . We'll do what we have to do, but this doesn't look very good for you in the future." Nearly two years

later, in 1997, Intercity lost the contract for three buildings at Women & Infants, but continued to perform services at seven others.

The original complaint, filed in 1995, alleged the LMRA claim along with state tort causes of action and was amended in 1997 to add separate counts for defamation involving Blue Cross (Count IV) and Women & Infants (Count V). As we have noted, only the LMRA claim against Local 254, and the defamation claims against Local 254 and Coleman, went to trial.

At trial, Bouthillette testified that Intercity suffered pecuniary damage not only from losing the accounts, but also from defendants besmirching its reputation, which diverted Bouthillette from developing new business due to the inordinate amount of time he spent reassuring customers that they would not be targeted for picketing. Plaintiff also introduced into evidence an accounting report, which quantified Intercity's loss from the Blue Cross account at roughly $30,000 per year.

In a bench ruling issued at the close of the plaintiff's evidence, the court granted defendants' Rule 50 motion on all three claims. It held the evidence in support of Intercity's LMRA claim insufficient as a matter of law because, even if Local 254's actions were proscribed illegal secondary activity (which was assumed for purposes of the decision), Intercity failed to show how that activity caused it to lose the Blue Cross and Women & Infants accounts. As for the two defamation counts, the court held that, although the evidence of knowing or reckless false statements was "overwhelming," Intercity presented

"no evidence that the plaintiff lost business at Blue Cross or at Women & Infants as a result of the defamation."

Appellant argues that it presented sufficient evidence on both fronts to reach the jury. On the LMRA claim, appellant asserts that the jury should have been afforded an opportunity to find that Intercity lost both the Blue Cross and Women & Infants accounts due to Local 254's illegal interference. On the defamation claims, appellant argues that it did not need to present evidence to prove damages and, even if it did, its proof on damages was sufficient. It also assigns error to the court's refusal to admit evidence of Local 254's assets in support of a claim for punitive damages.

We review Rule 50 challenges to the sufficiency of evidence presented at trial de novo, affirming entry of judgment as a matter of law "only if there 'is no legally sufficient evidentiary basis for a reasonable jury to find for [the non-moving party].' " *Tang v. Rhode Island Dep't of Elderly Affairs,* 163 F.3d 7, 11 (1st Cir.1998) (quoting Fed.R.Civ.P. 50(a)(1)). When judgment is entered before the jury is called upon to render its verdict, we examine the legal sufficiency of the evidence in the light most favorable to the non-moving party, and require more than a mere scintilla of evidence or speculation to justify the submission of an issue to the jury. *Id.* And, of course, we must ensure that the trial court has refrained from making credibility determinations or weighing the evidence.

Discussion

Appellant challenges the court's Rule 50 judgment, arguing that its claims of unlawful secondary activity and

defamation should have gone to the jury. We agree, in part. As for the LMRA claim, we conclude that the evidence linking Intercity's loss of the Blue Cross account to Local 254's interference was sufficient to merit consideration by a fact finder, but the evidence of losses attendant to the union's activities at Women & Infants was inadequate as a matter of law, particularly because that account was not terminated until almost two years later. As for the defamation claims, Intercity failed to introduce more than a scintilla of evidence of reputational harm or other specific damages. Accordingly, we remand the LMRA claim for trial, limited to liability for, and damages stemming from, Intercity's loss of the Blue Cross account, and affirm the district court's judgment on the defamation claims.

Unlawful Secondary Activity

Section 8(b) of the LMRA makes it an unfair labor practice for unions to threaten, coerce, or restrain a company by forcing it to cease doing business with another company. *See* 29 U.S.C. § 158(b)(4)(ii)(B).[2] Direct efforts to

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[2] "(b) It shall be an unfair labor practice for a labor organization or its agents –

(4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –

(B) forcing or requiring any person to cease . . . doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title:

pressure an employer with whom a union has a dispute are acceptable, but indirect efforts to pressure a secondary employer are unfair labor practices. *Abreen Corp. v. Laborers' Int'l Union*, 709 F.2d 748, 754-55 (1st Cir.1983). Here there was no dispute that Blue Cross was a secondary employer. Coleman, acting on behalf of Local 254, threatened to picket Blue Cross unless it ceased doing business with Intercity, a threat made not only to Bouthillette, but repeated to his attorney and the attorney for Blue Cross. The district court recognized this as "epitomiz[ing] the classic description of coercion within the labor law context." *Intercity*, 62 F.Supp.2d at 496 ("The evidence presented by plaintiff is not subtle; it reveals a transparent intention by Local 254 to pressure Blue Cross improperly.").

Despite this strong evidence of Local 254's improper secondary activity, the court did not let the claim go to the jury. It entered judgment for Local 254 on the ground that Intercity had failed to offer sufficient evidence that it lost the Blue Cross account because of Local 254's unlawful conduct. In analyzing Intercity's loss of the Blue Cross account, the court reasoned:

> There is not one shred of evidence produced at this trial to indicate why Blue Cross elected to put its janitorial contract out to bid. No one from Blue Cross testified. The Court and the jury can draw the inference that the failure of the plaintiff to produce Leite, who was the key

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Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . . " 29 U.S.C. § 158.

> man in this area, and probably made the decision, was because his testimony would have been of no value to the plaintiff. The point is that Blue Cross did put all of its janitorial work out to bid. The Plaintiff did bid, and didn't receive the bid and didn't receive the contract. The inference is that the plaintiff was not the low bidder. In any event, there's no evidence from Blue Cross as to why the plaintiff was not chosen. The jury should not be allowed to speculate because it is the plaintiff that has the burden of proof, and it is the plaintiff's obligation to produce witnesses who will support its cause of action. In this case the plaintiff has failed to do so.

This reasoning was in error because the court impermissibly drew negative inferences against Intercity. It inferred that the failure to call Leite "was because his testimony would have been of no value" and that Intercity lost the Blue Cross contract because "plaintiff was not the low bidder." The jury could have reasonably concluded otherwise.

As to the sufficiency of the evidence, the court simply noted that there was no basis for a finding of proximate cause. Neither it nor the parties attempted to give this term further definition. In our own jurisprudence dealing with unlawful activity, we have had three occasions to consider when, in accordance with the statutory wording, damages may be said to have been sustained "by reason of" the illegal activity. 29 U.S.C. § 187(b).[3] But in this case

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[3] In *Abreen*, our first such case construing the "by reason of" element, we held that where predominantly secondary

any difference between these standards is irrelevant, for under either formulation Intercity presented enough evidence at trial to warrant submission to the jury.

Bouthillette testified that Intercity lost its account with Blue Cross, not because it overbid,[4] but because of Local 254's threatened picket. Blue Cross attorney St. Peter corroborated Bouthillette's testimony about the union's unlawful threat. Bouthillette further testified that Blue Cross's own procurement officer, Leite, told him that Intercity would likely lose the account if it did not resolve

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activity is at issue, losses traceable to that unlawful union conduct may be recovered. 709 F.2d at 759. Our two subsequent cases, however, invoked a more exacting standard adopted from the Ninth Circuit's decision in *Mead v. Retail Clerks Int'l Ass'n*, 523 F.2d 1371 (9th Cir.1975), which held that injury occurs "by reason of" particular unlawful conduct only if that conduct "materially contributes" to the injury or is a "substantial factor" in bringing it about. *Id.* at 1376; *see John B. Cruz Constr. Co., Inc. v. United Bhd. of Carpenters and Joiners*, 907 F.2d 1228, 1232 (1st Cir.1990); *Tresca Bros. Sand & Gravel, Inc. v. Truck Drivers Union*, 19 F.3d 63, 65 (1st Cir.1994). Although we did not explicitly note the distinction, *Cruz* and *Tresca* are distinguishable from *Abreen* because they involved both lawful and unlawful union activity. The *Mead* rule, and our cases applying it, do not apply where only prohibited secondary activity is at issue.

[4] At trial, defense counsel suggested in his opening statement that Intercity's bid was nearly double the amount to which Bouthillette later testified, and more than that of the unionized bidder who won the contract. Of course, since the judgment entered before defendants put on their case, they had no opportunity to substantiate this claim. Because counsel's statement was not evidence, we, like a jury, may not consider it, *see, e.g., United States v. Brassard*, 212 F.3d 54, 57 (1st Cir.2000), and therefore must credit Bouthillette's testimony.

the dispute with the union.[5] Although plaintiff did not call Leite to testify, the jury was entitled to consider Bouthillette's uncorroborated testimony. Indeed, assuming favorable and permissible inferences and that Bouthillette was to be believed, there was no other competing cause for Intercity's loss of business.

Moreover, the timing of events permitted the jury to infer that Intercity's loss was caused by Local 254's conduct. The last readily identifiable unlawful act was Coleman's threat made to attorney St. Peter on March 28th; Blue Cross put its contract out to bid on May 5th. The court foreclosed jury consideration of a permissible inference, i.e., that these two events – which occurred just five weeks apart – were causally related. This it may not do. Because the timing and Bouthillette's testimony, if believed, would have sufficed as a matter of law to prove that Intercity's loss of the Blue Cross account occurred by reason of Local 254's unlawful activity, the LMRA claim should have been decided by the jury.

Intercity's loss of the Women & Infants account, by contrast, is unsupported by such an inference. The nearly two-year gap between Local 254's picketing and leafleting there and Women & Infants's curtailment of its business with Intercity was too attenuated on its own to permit an inference of some causal connection between these events. Bouthillette's testimony that his contact at Women & Infants, Neal, had made a reference to the union activity not boding well for Intercity's future, was

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[5] The court admitted this hearsay testimony over an objection and without a limiting instruction. Neither party takes exception to this ruling on appeal.

too opaque to rise above the scintilla level, especially in light of the timing of adverse action. The district court correctly found the evidence insufficient as a matter of law to prove Intercity lost any part of the Women & Infants account by reason of Local 254's activity.

Defamation

Intercity pleaded its defamation claim in two counts, one involving Blue Cross (Count IV) and the other involving Women & Infants (Count V). In support of Count IV, Intercity relied on Coleman's March 20, 1995, letter to Blue Cross's Leite, which announced that "Inter-City [wa]s in violation of both Federal and State laws and regulations." Count V alleged defamation from handbills distributed at Women & Infants, which claimed that "INTERCITY expose [d] its cleaners to chemical and biological hazards including HIV and Hepatitis B virus," and that Intercity did not provide certain benefits or pay a living wage. Local 254 made scant effort to investigate the veracity of these charges.

In its summary judgment ruling, the district court correctly found these assertions to be statements of fact, not opinion, requiring a jury to determine whether they were false and made with malice. *See Intercity*, 62 F.Supp.2d at 504-05.[6] As the court stated in its Rule 50

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[6] The court also rightly noted that certain other statements – characterizing Intercity as a "sweatshop," a "plague," and an "infestation," and Bouthillette as a "bloodsucking, plantation-minded boss" – were non-actionable opinion, "rhetorical hyperbole" typical of labor disputes and protected under the LMRA. *Id.* at 503.

decision, the evidence presented at trial was "overwhelming that those statements were either knowingly false or made with reckless disregard for truth or falsity." The judge remarked, "plaintiff has succeeded in proving that the defendants . . . are lawless, marauding, disingenuous, character assassins who deserve their comeuppance." Despite the strong evidence of malice, however, the court ruled there was "no basis for submitting this cause of action to the jury" because plaintiff failed to "allege and prove specific or special damages."

Relying on *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), the court held that Intercity could not rest on the common law presumption of damages, in which the existence of injury is presumed from the fact of publication without evidence of actual loss. *See generally Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Carey v. Piphus*, 435 U.S. 247, 262 & n. 18, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). Appellant argues that the court misread *Linn*, and contends in the alternative that it did present sufficient evidence of damages even without the presumption. We agree with the court's reading of the law and view of the evidence.

State tort claims are generally preempted by the LMRA. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). In *Linn*, the Court carved out an exception to the *Garmon* preemption rule for defamatory statements made with actual malice, adopting the standard applicable to public officials from *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (defining malicious libel as a statement published "with knowledge that

it was false or with reckless disregard of whether it was false or not"). *See Linn*, 383 U.S. at 65, 86 S.Ct. 657; *see also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Barss v. Tosches*, 785 F.2d 20, 21 (1st Cir.1986).

In addition to malice, *Linn* requires "proof of [ ] harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law." 383 U.S. at 65, 86 S.Ct. 657; *accord Belknap, Inc. v. Hale*, 463 U.S. 491, 509, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983); *Farmer v. United Bhd. of Carpenters & Joiners, Local 25*, 430 U.S. 290, 299, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). In explicitly requiring proof of harm, *Linn* preempts not only non-malicious libels, but also reliance on the common law presumption of damages in those jurisdictions where libel is actionable per se. 383 U.S. at 58 & n. 2, 65, 86 S.Ct. 657.[7] Therefore,

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[7] In Rhode Island, a common law action for defamation requires proof of "damages, unless the statement is actionable irrespective of special harm." *Swerdlick v. Koch*, 721 A.2d 849, 859-60 (R.I.1998). Under the common law rule damages are presumed, and the need to offer evidence obviated, if the defamatory statement is libelous per se. *See id.* at 861 ("[F]or statements to qualify as libel per se, the publication must impute insolvency, financial embarrassment, unworthiness of credit, or failure in business to a plaintiff, but to make them so it is essential that such imputation relate to or affect the plaintiff in his business.") (internal quotation marks and alterations omitted). Since Intercity presented evidence of harm to its business based on statements that are defamatory on their face, it would have been able to take advantage of the common law presumption of damages if the statements had not been made in the context of a labor dispute.

plaintiffs who endure even malicious libels during a labor dispute must present evidence of harm from defamation in order to recover, notwithstanding the law of states such as Rhode Island in which damages would otherwise be presumed. *Cf. Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1210-11 (11th Cir.1999) (Tjoflat, J., dissenting) ("Under federal law, [ ] a libel action arising out of a labor dispute requires proof of injury, regardless of state libel law." (citing *Linn*, 383 U.S. at 64-65, 86 S.Ct. 657)).

Under *Linn*, Intercity could not rest on an unsubstantiated allegation of injury to its reputation. Having correctly concluded that *Linn* preempted Intercity from relying on the common law presumption of damages, the district court held that the evidence of actual loss due to reputational harm and consequent lost profits was insufficient as a matter of law. We agree that Intercity offered no more than a scintilla of evidence to prove losses stemming from diminished reputation. However, in its amended complaint Intercity also sought to substantiate its claim for defamation with evidence of specific damages apart from reputation: the loss of the Blue Cross and Women & Infants accounts.

Had appellant shown that it lost the contracts as a result of Coleman's libelous letters or the defamatory handbills, then such proof of a "specific item of pecuniary loss" would have satisfied the damages element required by *Linn*. 383 U.S. at 65, 86 S.Ct. 657. But Intercity presented no evidence – not even hearsay testimony from Bouthillette – to show the loss of the contracts resulted from Local 254's malicious accusations. The only such testimony related to threats of union retaliation. The evidence in support of specific damages pleaded in Counts

IV and V was therefore inadequate to merit jury consideration.

Intercity also argues that it should have been permitted to recover punitive damages and introduce evidence of Local 254's assets in support of that claim. Absent evidence of actual damages, however, no punitive damages may be awarded. *See Linn*, 383 U.S. at 66, 86 S.Ct. 657 ("[A] defamed party must establish that he had suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages."). Because plaintiff failed to present evidence from which the jury could have found that Intercity suffered actual harm due to defamation, the district court properly refused to admit evidence of punitive damages.

Conclusion

We remand for retrial Count II of the Amended Complaint, the LMRA claim; in all other respects, the judgment is affirmed.

Affirmed in part, vacated in part and remanded. No costs.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-1522

INTERCITY MAINTENANCE COMPANY,
Plaintiff, Appellant,

v.

LOCAL 254, SERVICE EMPLOYEES INTERNATIONAL UNION; SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR LIMA AND DONALD COLEMAN,
Defendants, Appellees.

JUDGMENT

Entered: March 2, 2001

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part, vacated in part and remanded to the district court in accordance with the opinion issued this day. No costs.

By The Court

Phoebe D. Morse
Clerk.

[cc: Messrs. Ragosta, Jr., Lawlor, Jr., & Hoffman]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

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INTERCITY MAINTENANCE CO.

V.

LOCAL 254 SERVICE EMPLOYEES INTERNATIONAL UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, VICTOR LIMA and DONALD COLEMAN

C.A. NO. 95-630 L

PROVIDENCE, RI
11 APRIL 2000

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BEFORE HONORABLE DISTRICT JUDGE
RONALD R. LAGUEUX
(AND A JURY)

APPEARANCES:

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Proceeding reported and produced by computer-aided stenography

* * *

[32] THE COURT: All right. This is the motion of the defendants, Local 254 and Coleman, for judgment as a matter of law after the presentation of the plaintiff's case on the three remaining counts of this amended complaint.

Count II charges a violation of 303 (a), illegal secondary activity; and Counts IV and V are the defamation counts. Count IV relating to publication to Blue Cross, and Count V, publication to Women & Infants.

In deciding a motion of this type, the Court must view the evidence in the light most favorable to the plaintiff and draw all reasonable inferences in favor of the plaintiff. I will first deal with the defamation counts.

I made a comprehensive ruling on this matter yesterday at a premature stage in the litigation because I had to decide whether certain evidence was admissible. To determine the [33] admissibility of that evidence, I had to determine whether a prima facie case of defamation had been made out and, in addition, if one had been made

out, whether a prima facie case for punitive damages had been made out. So I had to analyze the state of the evidence at that time. The state of the evidence has not changed. The plaintiff has succeeded in proving that the defendants, Local 254 and Coleman, and other employees of the Local, such as Sullivan and Lima, are lawless, marauding, disingenuous, character assassins who deserve their comeuppance. However, plaintiff has failed to prove every element of a defamation cause of action in this context. Proving some of the elements of defamation is not enough to send that cause of action to a jury.

As I indicated yesterday, the evidence indicates that Coleman and Sullivan, and Local 254, made false statements of fact by writing letters to Blue Cross and Women & Infants, and by distributing leaflets at Women & Infants. The evidence is overwhelming that those statements were either knowingly false or made with reckless disregard for truth or falsity. But in a situation where the Supreme Court has occupied the field, that's not enough. It's not enough even to add that the [34] defamations were made with actual malice in the common law sense, that is, with the intent to do harm to the plaintiff.

The Supreme Court has made it clear in Linn, and in other cases, that the per se libel rule that is in effect in most states is not applicable in this context and, therefore, the plaintiff must allege and prove specific or special damages.

In this case, there is no evidence from which the jury could conclude that the plaintiff has succeeded in proving special damages arising out of the defamation. It would be sheer speculation for the jury to conclude that

the plaintiff suffered some type of loss as a result of these libelous statements. There's absolutely no evidence that the plaintiff lost business, because the plaintiff is a corporation here, and that's a very important consideration in the case. It is the plaintiff who has brought this suit for defamation. There is no evidence that the plaintiff lost business at Blue Cross or at Women & Infants as a result of the defamation, therefore, there's no basis for submitting this cause of action to the jury. The jury simply cannot come back with a verdict for the plaintiff on this defamation cause of action and, [35] therefore, as I stated yesterday, I have to grant a directed verdict to the defendants, Local 254 and Coleman, on Counts IV and V. It's now called judgment as a matter of law, and that's what will be entered, a judgment for those defendants on Counts IV and V.

Now let's get to the claim for a 303 violation, illegal secondary activity. It is clear that this cause of action implicates two little words, "proximate cause". That's where the horse is buried in this case. The weakness in plaintiff's case in this area was evident from the very beginning. I will assume, for purposes of deciding the motion on that count, that the plaintiff has made out enough of a case to go to the jury on whether there were sufficient threats and coercion exercised by the Local on Blue Cross and Women & Infants. The question, however, is whether that illegal secondary activity proximately caused the plaintiff to lose business.

First, let's take Blue Cross. The evidence is clear that plaintiff had a business relationship with Blue Cross which was an at-will relationship. Blue Cross could terminate it at anytime, as could the plaintiff. There is not

one [36] shred of evidence produced at this trial to indicate why Blue Cross elected to put its janitorial contract out to bid. No one from Blue Cross testified. The Court and the jury can draw the inference that the failure of the plaintiff to produce Leite, who was the key man in this area, and probably made the decision, was because his testimony would have been of no value to the plaintiff. The point is that Blue Cross did put all of its janitorial work out to bid. The plaintiff did bid, and didn't receive the bid and didn't receive the contract. The inference is that the plaintiff was not the low bidder. In any event, there's no evidence from Blue Cross as to why the plaintiff was not chosen. The jury should not be allowed to speculate because it is the plaintiff that has the burden of proof, and it is the plaintiff's obligation to produce witnesses who will support its cause of action. In this case the plaintiff has failed to do so.

Therefore, there is no evidence before this jury from which they could find that the defendant Local's illegal secondary activity was the proximate cause of the plaintiff losing the Blue Cross business.

The same situation obtains with Women & [37] Infants business. As a matter of fact, it couldn't be any more clear that there is a complete lack of proof of proximate cause in the Women & Infants situation. The evidence is that there was a picket line thrown up at Women & Infants by the defendant, but that was over by early April 1995. It wasn't until almost 2 years later that Women & Infants decided to change its janitorial arrangements, but plaintiff didn't lose out completely. It kept some of the business. There is absolutely no evidence in the record as to why Women & Infants did that at that

time. It would be sheer speculation for a jury to conclude that it was because of some picketing that occurred almost two years before.

Again, it is the plaintiff's obligation to produce evidence on proximate cause, and plaintiff has utterly failed to do so in this respect. This is the weakness in plaintiff's case. It was a weakness that should have been evident throughout this trial. It was an issue that the Court was watching very carefully because the Court saw this issue by reading the pretrial memoranda. The plaintiff has just failed to prove a case. Maybe there's some solace in the fact that there has been some proof that defendant Local acts in a reckless and unlawful way [38] when it suits its purposes. But unfortunately for plaintiff, there's been no showing that the Local must respond in damages in this case.

So the motion of the defendant Local for judgment as a matter of law on Count II is granted. This wraps up this whole case. The Court has previously granted summary judgment. So all five counts of the complaint have been disposed of. Judgment will be entered for the defendants on all five counts of the complaint.

To recapitulate, all defendants were granted summary judgment with respect to Counts I, III and VI. Actually, there were six counts in the complaint.

On Count II, the Court granted summary judgment to the International, Lima and Coleman, and now grants the motion for judgment as a matter of law of the Local. So judgment will be entered for all defendants on Count II, as well.

On Counts IV and V of the amended complaint, the motions of the International and Lima were granted, and now the motion for judgment as a matter of law by Local 254 and Coleman are granted. So the clerk can put it in shorthand form, judgment for all defendants on all six counts of the amended [39] complaint will be entered. The clerk will enter that judgment forthwith. The plaintiff may have an objection to the Court's ruling for preservation of its appellate rights. Bring the jury in and I'll discharge them.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Intercity Maintenance Co. CA No. 95-630L

Vs.

Local 254, Service Employees Int'l Union, Victor Lima and Donald Colement

Judgment

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendere

[X] Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard an

IT IS ORDERED AND ADJUDGED:

Judgment for the Defendants on all counts of the Amended Complaint

/s/ Barbara J. D'Amico
Deputy Clerk
April 11, 2000

United States District Court,
D. Rhode Island.

INTERCITY MAINTENANCE CO., Plaintiff,

v.

LOCAL 254 SERVICE EMPLOYEES INTERNATIONAL UNION, Service Employees International Union, AFL-CIO, Victor Lima, and Donald Coleman, Defendants.

No. 95-630.

July 29, 1999.

Vincent F. Ragosta, Jr., Matthew Oliverio, Providence, RI, Christine M. Curley, N. Kingstown, RI, for plaintiff.

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OPINION AND ORDER

LAGUEUX, Chief Judge.

This litigation embodies the classic struggle between employer and union. In this labor dispute, like in many others that escalate to such a dramatic level of contention, the former is committed to operating on a non-union basis while the latter is equally devoted to challenging that employer's labor policy. Economic philosophies clashed. An often personal battle of wills ensued, replete with threats, posturing, and collateral damage. Plaintiff Intercity Maintenance Co. ("Intercity") alleges that the

union defendants crossed the bounds of acceptable behavior established by the labor laws that govern organizing campaigns. Most importantly, Intercity avers damage to its business from improper secondary boycotting orchestrated by defendants. Plaintiff also presses a variety of state tort claims, including tortious interference with its business relationships, defamation, and violation of its privacy rights. Plaintiff seeks to hold liable union actors all along the chain of command, from the Service Employees International Union, AFL-CIO ("International" or "SEIU") and Local 254 Service Employees International Union ("Local 254") to individual union officials Victor Lima ("Lima") and Donald Coleman ("Coleman"). Defendants counter with a raft of defenses and move for summary judgment on all counts of the Amended Complaint. For the reasons stated below, defendants' Motions for Summary Judgment are granted in part and denied in part.

BACKGROUND

On a motion for summary judgment, the Court must view all evidence and related reasonable inferences in the light most favorable to the nonmoving party. *See Springfield Terminal Ry. Co. v. Canadian Pac. Ltd.*, 133 F.3d 103, 106 (1st Cir.1997). The following factual recital is constructed with that instruction in mind.

Intercity, a small corporation based in Cumberland, Rhode Island, provides janitorial services to commercial buildings in the Providence, Rhode Island area. Michael Bouthillette ("Bouthillette"), president of Intercity, hoped to establish the company as an important provider of

janitorial services to the health care sector in Providence. To this end, Intercity secured work at the Providence facilities of Women & Infants Hospital ("Women & Infants") and Blue Cross/Blue Shield of Rhode Island ("Blue Cross"). As of late 1994, none of Intercity's employees were unionized. Local 254 wished to change that.

In December 1994, Lima, an employee of Local 254 assigned to the task of organizing janitorial workers in Providence, telephoned Bouthillette to announce that Local 254 planned to organize Intercity's employees working at the Blue Cross site. Lima requested that Intercity voluntarily recognize Local 254 as the workers' collective bargaining agent. Bouthillette refused the offer and explained that the decision would have to be made by the workers themselves. The two parties jousted over the telephone without resolution for some time. Lima approached Intercity employees at their Blue Cross job site and encouraged them to sign union affiliation cards. Some apparently did so. Bouthillette, learning of this intrusion into the employees' work day, ordered Lima to leave Intercity's employees alone when they were working. In January 1995, Lima and Bouthillette agreed to meet face to face.

At the meeting between Bouthillette and Lima, also attended by Robert Richard, Bouthillette's friend, Lima presented Bouthillette with signed affiliation cards from Intercity employees working at the Blue Cross site. Lima insisted that Local 254 was only interested in representing Intercity's employees working at that facility, and not those working at other buildings in the area. According to Bouthillette, Lima insisted that if Intercity did not

comply with Local 254's request for voluntary recognition, the union would cause the company to lose the Blue Cross job, harass people associated with Intercity, and eventually drive Intercity out of business. Bouthillette recalls that Lima boasted that the union would use "Latino terrorist organizations," ex-convicts, and homeless people to accomplish its goals. To lend credence to these threats, Bouthillette maintains, Lima explained that Local 254 had severely damaged the business of another local janitorial services company, Aid Maintenance, for resisting the union's efforts to organize. Nonetheless, Bouthillettte remained steadfast in his refusal to knuckle under.

Undeterred, the persistent Lima and Local 254 pressed on with their organizing campaign. Attempts by Lima to speak to Intercity employees at the Blue Cross site were rebuffed by Intercity and Blue Cross security. Local 254 also renewed its efforts to convince Bouthillette to voluntarily recognize the union. Coleman, the director of organizing for the local, and Lima, Coleman's assistant, spoke to the company president on several occasions in January and February 1995. Unknown to the union representatives, Bouthillette recorded many of those conversations. Bouthillette now presents the transcripts of those audio recordings as evidence.

During these telephone discussions, Lima and Coleman first tried to cajole Bouthillette into coming around to their position. As Bouthillette stood firm, the two union officials eventually turned up the heat. During one conversation, Lima responded to Bouthillette's continued defiance with the following threat: "Well, then we're going to fight you all the way on this. We're going to call

Blue Cross/Blue Shield and put a picket line up." Later in that same conversation, Lima offered the following: "Well, I'm just going to tell you what's going to happen now. I don't know how long you'll probably stay at Blue Cross, but I'm going to call them up right after I talk to you." Lima soon thereafter made his intentions express: "I guarantee you, Blue Cross ain't going to tolerate a picket line up there because we've picketed them in Boston before and all the other unions. We're going to put a nationwide boycott there, you think they're going to like that?" Bouthillette inferred a threat of violence from Lima's warning that he knew where Bouthillette lived and from Lima's boast that Local 254 could rely on the aid of "terrorists" to achieve their objectives. On February 21, 1995, Bouthillette obtained from Rhode Island Superior Court a restraining order against Lima and any agents acting on his behalf.

By early March, Blue Cross officials had become concerned. John Leite ("Leite"), the Director of Facilities Management for Blue Cross and the official responsible for selecting janitorial contractors, called Bouthillette to ask about Intercity's confrontations with Local 254 at the Blue Cross facility. Leite ordered Bouthillette to settle the dispute. Plaintiff alleges that several weeks later Leite explained to Bouthillette that Intercity would be dismissed unless they agreed to the union's demands. According to plaintiff, Leite was primarily concerned with putting a halt to the disruptions within the Blue Cross facility.

Lima continued to call Bouthillette in March. Bouthillette maintains that Lima threatened to put Intercity out of business unless he complied with the wishes of

Local 254. There is also evidence that officials of the union directly threatened Blue Cross. In an affidavit filed in support of plaintiff's cause, Gary St. Peter ("St.Peter"), a labor relations attorney for Blue Cross, describes a telephone conversation he had with Coleman on March 28, 1995. St. Peter claims that Coleman identified himself as an agent of Local 254. Coleman explained that the union was engaged in an organizing campaign of Intercity employees. St. Peter states that Coleman then threatened retaliation. The affidavit explains that Coleman said "[t]hat if Blue Cross/Blue Shield of Rhode Island did not pressure Intercity into recognizing Local 254 as the exclusive bargaining representative for Intercity's employees, [Local 254] would throw up a picket line at [Blue Cross's] premises." St. Peter contends that he warned Coleman that such action would constitute prohibited secondary activity and that Coleman responded that the union would do it anyway.

Local 254 launched a new tactic against Intercity in late March 1995. In a March 20, 1995 letter to Bouthillette, copied to Leite, Coleman declared that "a health emergency exists at Blue Cross Blue Shield and Women and Infants Hospital." Coleman alleged that Intercity was in violation of federal and state health laws by failing to provide employees with safety books or federally-approved safety training for handling hazardous substances. The letter specifically noted that Intercity regularly violated the "Blood Born Pathogen Act in that its cleaners on a daily basis are being exposed to urine, excrement and vomit that could contain contaminated blood." Coleman asserted that the company had not provided employees with proper protective clothing and

equipment. The letter concluded by asking a series of questions mainly related to a work site's ventilation system, though it is unclear from the letter to which site the questions relate.

That same day, Coleman wrote a letter to Leite explaining that Intercity had refused his request for information. Coleman, stated that "the union has a duty to protect its members along with the employyes [sic] of Bluecross [sic] from sickness and hazzards [sic] caused by chemical contamination." The letter demanded answers to the union's questions immediately.

Plaintiff alleges that the union's actions damaged its business relationship with Blue Cross. Intercity entered into a contract to provide janitorial services to Blue Cross in 1990. The one-year pact was renewed by Blue Cross the next year and each subsequent year until 1995. The parties often dispensed with contract formalities. They never executed new written agreements, but continued the relationship according to the terms of the 1990 writing. Each year Blue Cross sent Intercity a new purchase order for janitorial services for the upcoming year and Intercity continued its work without the necessity of bidding or negotiations. Plaintiff alleges that Blue Cross officials were thoroughly satisfied with the company's performance.

In the midst of Intercity's conflict with Local 254 in the early months of 1995, Bouthillette discussed with Leite a plan to provide Blue Cross with janitorial services during its planned construction project, expected to last for two years. By May, however, Leite's attitude had changed. Blue Cross decided to request competing bids

on the janitorial services contract, something it had not done since first hiring Intercity in 1990. Bouthillette testified at his deposition about a conversation he had with Leite after learning that the Intercity contract would not be automatically renewed as had been done in the past, even though Intercity had not increased its proposed charges for the next year. Bouthillette claims that Leite explained that the contract was being bid because of Intercity's union troubles. Furthermore, Bouthillette alleges that Leite expressed an ultimatum: Intercity had a good chance at winning the contract if it agreed to Local 254's request, but it had no chance at all if Intercity continued to snub the union. Still, Bouthillette refused to negotiate with Local 254.

Blue Cross did not select Intercity for the cleaning contract. On June 29, 1995, Edward T. Sullivan, Jr., Local 254's Business Manager, wrote to John J. Sweeney, President of the International, touting Local 254's achievements in the region. Sullivan proudly reported "that Intercity has been expelled at Blue Cross/Blue Shield and replaced by a Local 254-contracted cleaner."

The union's strategy for organizing Intercity was not limited to pressuring Blue Cross. Plaintiff claims that in late March or early April 1995, Lima spoke to Intercity employees working at Women & Infants. Beginning at the end of March, Local 254 picketed Intercity at Woman & Infants for one week. Picketers distributed handbills to all who entered the hospital, including employees of Women & Infants, patients, and other visitors. The leaflets were clearly identified as the work of Local 254, and at least two of them were styled as letters to the public from Sullivan.

One handbill depicted a large bug encircled and crossed out by a diagonal line accompanied by the headline "Women and Infants TICKS us off." The leaflet read as follows:

> INTERCITY MAINTENANCE COMPANY is an infestation that sucks the blood of Latino workers. Janitors at Women and Infants' Hospital are human beings and should not be treated as animals. INTERCITY has infected its cleaners as follows:
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> INTERCITY does not pay a living wage
>
> INTERCITY does not pay Holiday pay
>
> INTERCITY does not pay health insurance
>
> INTERCITY exposes its cleaners to chemical and biological hazards including HIV and Hepatitis B virus
>
> WE DEMAND JUSTICE FOR JANITORS!
>
> STOP THE SPREAD OF THE INTERCITY PLAGUE!!

In another leaflet, Sullivan labeled Intercity "a notorious company." The handbill continued by claiming that the cleaning company pays

> its workers well below area standards, with literally no health insurance, paid holidays, vacation, pension, or job security rights. Intercity has turned back the clock, infesting your shop with the kind of sweatshop conditions you and your Unions fought so hard to exterminate.
>
> The leaflet concluded by explaining that Local 254's intention here at Women and Infants is to stop the spread of the Intercity Plague and protect your workplace from sweatshop infection.

> We regret that the Hospital's insensitivity to the plight of Intercity workers forced us to involve you in this dispute, but, as you well know, sometimes dramatic measures are necessary to gain attention.

A final leaflet, dated April 7, 1995, was distributed after the hospital "notified Local 254 that Intercity Cleaning has no employees working here at Women and Infants!" At that point, the union ended its picketing and thanked the hospital's administration for "exterminating Intercity and its bloodsucking, plantation-minded boss, Michael Bouthilette [sic]."

Bouthillette claims that soon before the picketing at Women & Infants, several people called the Intercity office and left messages for him, referring to him as a "bug." One of the callers is identified by Bouthillette as Coleman. Bouthillette maintains that at about this same time, his secretary received a call from Lima who told her that the union was no longer interested in organizing the company and that they now aimed only to force Intercity out of business.

According to plaintiff, Local 254's actions against the cleaning company were not isolated incidents. Intercity urges this Court to view defendants' behavior in light of other campaigns to organize workers orchestrated by the union defendants. In 1993, Local 254 targeted workers of Aid Maintenance, a janitorial services firm operating in Rhode Island and southeastern Massachusetts. According to Coleman, the union picketed Aid Maintenance at the site of one of the company's cleaning clients. Coleman explained at his deposition that the picketing was designed to protest the wages paid by Aid Maintenance,

which the union believed were below the area standard. Coleman also admitted that the union was intent on driving the company out of the region if it could not be organized. The undeveloped record is unclear, however, whether the picketing constituted improper secondary activity. Coleman denied that the union pressured the client to encourage Aid Maintenance to negotiate with Local 254. Eventually, the cleaning company lost its contract with this client.

Local 254's efforts to organize janitorial workers in Rhode Island and Massachusetts were encouraged and supported by the International. The International developed a nationwide organizing campaign called "Justice for Janitors" aimed at unionizing independent contractors that supply janitorial services. Coleman testified at his deposition that the International encouraged locals to create community-wide coalitions, including civic and religious groups, to spread the word about employers who paid wages and set work conditions deemed unfair by the coalition. The purpose of this publicity was to pressure employers to adopt the union's standards for wages and benefits.

The International also subsidized Local 254's organizing activities in southeastern Massachusetts. In 1993, the International infused Local 254 with $10,000 each month for eight months for organizing projects. This financial support ended in February 1994. In exchange for its material assistance, the International required that the local provide it with summaries of its activities, accomplishments, and expenditures. One such three-page report dated October 22, 1993 sketches in broad strokes

the local's campaign to organize janitorial services contractors in Massachusetts and Rhode Island. While the report lists picketing and leafleting as activities engaged in and lists the employment sites targeted, few details regarding the type, content, or intent of the activities are provided.

The International also played an important role in marking the jurisdictional boundaries of Local 254's activities. Although Local 254 is based in Boston and concentrates its efforts on workers in Massachusetts, its jurisdiction was expanded by the International during the course of its campaign to organize janitorial workers in the borderland region of northern Rhode Island and southeastern Massachusetts. During its 1993 campaign to organize Aid Maintenance, a Rhode Island-based company operating in Massachusetts, Local 254 received the nonexclusive right from the International to organize building services contractors in Rhode Island. This decision was issued by the president of the International, pursuant to the SEIU's Constitution and Bylaws, which governs the relationship between the International and local affiliates.[1] A jurisdictional dispute ensued between Local 254 and Local 134, an SEIU local based in Rhode Island. The International dispatched a hearing officer to resolve the conflict. The specifics of the dispute and its eventual resolution are complicated and largely irrelevant to this inquiry. What is relevant, however, is that in the end, the International successfully refereed the tussle and

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[1] Article XIII of the SEIU Constitution and Bylaws provides that the International Executive Board is empowered to "determine all questions of jurisdiction between Local Unions."

Local 254 was allowed some rights to operate within Rhode Island.

Plaintiff has presented no other evidence of involvement by officials of the International in the efforts of Local 254 to organize Intercity, Aid Maintenance, or any other janitorial services company in the southern New England area. Certainly, there is no evidence of direct participation by officials of the International in the acts denounced by plaintiff. There is also no evidence in the record revealing the extent of the International's knowledge of the methods used by Local 254 to organize Intercity or Aid Maintenance. This is not surprising given the substantial autonomy that locals are granted under the SEIU's Constitution and Bylaws. This document gives locals the power to elect officers, negotiate and execute collective bargaining agreements, rule on membership applications, maintain their own financial affairs, and establish independent rules and regulations. According to Joseph Buckley, Eastern Regional Director of the SEIU and the International employee best acquainted with the organization of SEIU locals in the northeast, Local 254 exercises all of these rights. He also declares in an affidavit that no employees of Local 254, including Coleman and Lima, are authorized agents of the International. Furthermore, Article XXI of the International's Constitution and Bylaws expressly limits the liability of the International for the acts of local unions.[2]

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[2] The International's liability is limited by Article XXI of its Constitution and Bylaws:

> Except as is otherwise specifically provided in this Constitution, no Local Union, or affiliated body, nor

Plaintiff, concluding that the behavior of these labor organizations rises to the level of actionable violations of Intercity's legal rights, responded by commencing the instant lawsuit. The original pleading in this case was filed in 1995. That complaint alleged several causes of action grounded in federal labor law and state tort law. Senior Judge Raymond J. Pettine of this Court presided over this controversy until 1997, when the case was reassigned to this writer. In November 1997, this Court granted plaintiff's Motion to Amend by adding three additional state law counts. The Amended Complaint sets forth six causes of action, one based on federal labor law and five based on state law. Plaintiff seeks to hold each defendant liable on all counts.

Count I alleges that defendants tortiously interfered with the contractual relationship between plaintiff and Blue Cross. Count II alleges that defendants violated § 303(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187, by engaging in prohibited secondary activity that harmed plaintiff. Count III alleges that defendants tortiously interfered with the advantageous business relationship between plaintiff and Blue Cross. Count IV alleges that defendants defamed plaintiff to Blue Cross. Count V alleges that defendants defamed plaintiff to Women & Infants. Count VI alleges that defendants violated the Rhode Island Privacy Act,

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any officer, employee, organizer or representative of a Local Union or affiliated body or of this International Union shall be authorized to make contracts or incur liabilities for or in the name of the International Union unless authorized in writing [by the International].

R.I.Gen.Laws § 9-1-28.1, by placing plaintiff's business operations in a false light through defendants' actions at a Women & Infants facility. The Amended Complaint demands compensatory and punitive damages, as well as interest and costs. Subject matter jurisdiction is premised on the federal question doctrine and the supplemental jurisdiction provision of 28 U.S.C. § 1367. Before the Court now are the Motions for Summary Judgment on all counts filed by all defendants.

DISCUSSION

I. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard for ruling on a motion for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c). The critical inquiry is whether a genuine issue of material fact exists. "Material facts are those 'that might affect the outcome of the suit under the governing law.' " *Morrissey v. Boston Five Cents Sav. Bank*, 54 F.3d 27, 31 (1st Cir.1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "A dispute as to a material fact is genuine 'if the evidence is such that a reasonable jury could return a

verdict for the nonmoving party.' " *Id.* (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505).

On a motion for summary judgment, the Court must view all evidence and related reasonable inferences in the light most favorable to the nonmoving party. *See Springfield Terminal Ry. Co.*, 133 F.3d at 106. "[W]hen the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences at the summary judgment stage." *Coyne v. Taber Partners I*, 53 F.3d 454, 460 (1st Cir.1995). Similarly, "[s]ummary judgment is not appropriate merely because the facts offered by the moving party seem more plausible, or because the opponent is unlikely to prevail at trial." *Gannon v. Narragansett Elec. Co.*, 777 F.Supp. 167, 169 (D.R.I.1991).

II. The Secondary Pressure Claim

A. The Law of Improper Secondary Pressure

The law recognizes that labor disputes often create friction and unease among the warring parties. Given the realities of these struggles, much of the consequent strife is not actionable in a court of law. However, Congress has delimited the bounds of fair play in such conflicts. The universal marker of this limit is the "unfair labor practice." Although both antagonists in a labor dispute are restrained by the bit and bridle of the unfair labor practice rules, in this case the Court is concerned only with the prohibitions applicable to labor organizations. Through its landmark Labor Management Relations Act

("LMRA"), 29 U.S.C. §§ 141 et seq., Congress has proscribed that labor organizations may not use certain organizing tactics deemed too costly to social and economic peace to achieve even appropriate ends. *See id.* § 158(b) (defining unfair labor practices by labor organizations).

Among the tactics prohibited by the federal labor laws is the application of an unlawful secondary boycott. The rule is found in § 8(b)(4)(ii)(B) of the LMRA:

> It shall be an unfair labor practice for a labor organization or its agents –
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> . . .
>
> (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –
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> . . .
>
> (B) forcing or requiring any person to cease . . . doing business with any other person . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

29 U.S.C. § 158(b)(4)(ii)(B). Underlying this prohibition is the Congressional intent to balance the resources of the partisans "by 'preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and [by] shielding unoffending employers and others from pressures in controversies not their own.' " *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 259, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964) (quoting *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S.

675, 692, 71 S.Ct. 943, 95 L.Ed. 1284 (1951)). The real bite of this provision is found at § 303 of the LMRA, which provides that "[w]hoever shall be injured in his business or property by reason of any violation" of the improper secondary pressure ban "may sue therefor in any district court of the United States." 29 U.S.C. § 187(b). Damages may be recovered if plaintiff is able to prove that they occurred "by reason of" the improper secondary activity. *See Morton*, 377 U.S. at 261, 84 S.Ct. 1253.

To understand the reach of this statutory rule, several important distinctions must be recognized. The first is between primary and secondary pressure, for a union runs afoul of the law only when it engages in the latter. Theoretically, the distinction is a simple one to draw. Pressure is primary when its target is the employer with whom the union has a labor dispute. Pressure is secondary when its target is some employer other than the one engaged in a labor dispute with the union applying the pressure. To make this distinction, courts inquire into the "object" of a union's activity. If "the object of the union's conduct, taken as a whole, is to bring indirect pressure on the primary employer by involving neutral or secondary employers in the dispute, the conduct is secondary and prohibited." *Abreen Corp. v. Laborers' Int'l Union*, 709 F.2d 748, 754-55 (1st Cir.1983). A plaintiff need not prove that the union's sole or primary object is to employ secondary pressure, only that one of its objects is the use of secondary pressure. *See Pye v. Teamsters Local Union No. 122*, 61 F.3d 1013, 1023 (1st Cir.1995); *see also Abreen Corp.*, 709 F.2d at 755 (holding that plaintiff must show that the secondary pressure is not "merely incidental[ ] to the pressure imposed on the primary employer"). Intent,

therefore, is the first necessary element of a cause of action under § 8(b)(4)(ii)(B). *See Pye*, 61 F.3d at 1021; *Pepsi-Cola Co. v. Rhode Island Carpenters Dist. Council*, 962 F.Supp. 266, 273 (D.R.I.1997). Direct evidence of intent, a rare commodity, is not required, for intent may "logically be inferred from the nature of the conduct, evaluated in light of the practical realities of a given situation." *Pye*, 61 F.3d at 1022.

The distinction is muddied as the relationship between employers becomes more complex. Often a critical determination in resolving a secondary pressure claim involves the definition of secondary, or neutral, employers. No bright line rule governs this issue. A court must apply a totality of the circumstances test. *See National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 644, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967). However, the United States Court of Appeals for the First Circuit has announced a useful test for making such determinations. The key inquiry is "whether there is actual or active common control sufficient to denote an appreciable integration of operations and management policies" between the two employers. *John B. Cruz Constr. Co. v. United Bhd. of Carpenters, Local 33*, 907 F.2d 1228, 1231 (1st Cir.1990).[3]

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[3] Another potential difficulty in making out a claim for improper secondary activity occurs when the primary employer's work site is also occupied by secondary employers. In these cases, union activity at the common situs may implicate the secondary activity prohibition unless the union can demonstrate that its conduct was purely primary. *See Cranshaw Constr. of New England, L.P. v. International Ass'n of Ironworkers, Local No. 7*, 891 F.Supp. 666, 672 (D.Mass.1995). Courts resort to the four-factor *Moore Dry Dock* test, deemed a useful

The second major distinction that must concern a court faced with a secondary boycott claim is the one between proper and improper secondary activity. It is well-settled that not all secondary pressure exerted by a labor organization is prohibited by law. "Unions may make peaceful appeals for support from the management of companies dealing with the primary employer." *Abreen Corp.*, 709 F.2d at 757. The federal reports are replete with explanations of the distinction between proper and improper secondary pressure. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577-79, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (holding that prohibited secondary pressure involves coercion or threats); *NLRB v. Servette, Inc.*, 377 U.S. 46, 53-54, 84 S.Ct. 1098, 12 L.Ed.2d 121 (1964) (same); *Abreen Corp.*, 709 F.2d at 757 (same); *see also BE&K Constr. Co. v. United Bhd. of Carpenters*, 90 F.3d 1318, 1330 (8th Cir.1996) ("Even if the purpose of the activity is to force an employer to stop doing business with another, a union may attempt peacefully to persuade, induce, or encourage it to cease the relationship."). The defining characteristic of improper secondary pressure is coercion. " '[A] union is free to approach an employer to persuade him to

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"evidentiary tool" by the courts, to "aid in the line-drawing necessary in such cases." *Abreen Corp.*, 709 F.2d at 755; *see Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547 (1950). In the case sub judice, plaintiff's claims of improper secondary activity do not arise from union conduct at a common situs, although some union picketing in this case did occur at a Women & Infants facility where both plaintiff and neutral employers worked.

engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees.' " *Morton*, 377 U.S. at 259, 84 S.Ct. 1253 (quoting *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 99, 78 S.Ct. 1011, 2 L.Ed.2d 1186 (1958)).

Coercion, therefore, is the second necessary element of a secondary boycott cause of action under § 8(b)(4)(ii)(B) of the LMRA. *See Pye*, 61 F.3d at 1022; *Pepsi-Cola Co.*, 962 F.Supp. at 273. Courts have declined to impart a rigid and technical meaning to this term. Coercion, within this context, is a flexible concept, potentially encompassing many types of conduct. *See Pye*, 61 F.3d at 1024 (discussing a range of conduct that meets the statutory requirement). Mindful that the First Circuit advised that the secondary boycott provision is "pragmatic in its application," *Pye*, 61 F.3d at 1024, this Court will allow common sense to be the guide. Accordingly, there can be no dispute that picketing, or threatening to picket, a neutral employer to achieve a result in a labor dispute with some other employer satisfies the coercion test. *See Pepsi-Cola Co.*, 962 F.Supp. at 275.

B. Statute of Limitations

Defendants pose as a bar to plaintiff's secondary boycott count the six-month statute of limitations applied to § 301 actions by the United States Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 172, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). This attempt to forestall Intercity's federal cause of action is unavailing. The argument for applying the six-month limit has been rejected by the four circuit courts of

appeals who have considered the question. *See BE & K Constr. Co. v. Will & Grundy Counties Bldg. Trades Council*, 156 F.3d 756, 763 (7th Cir.1998); *Prater v. United Mine Workers, Dists. 20 & 23*, 793 F.2d 1201, 1209-10 (11th Cir.1986); *Carruthers Ready-Mix, Inc. v. Cement Masons Local Union No. 520*, 779 F.2d 320, 327 (6th Cir.1985); *Monarch Long Beach Corp. v. Soft Drink Workers, Local 812*, 762 F.2d 228, 231 (2d Cir.1985). This Court finds the reasoning of those decisions persuasive. Therefore, the applicable statute of limitations for plaintiff's § 303 action is "the most closely analogous state limitations period." *BE & K Constr. Co.*, 156 F.3d at 763.

Plaintiff commenced this action on December 5, 1995, less than one year after the occurrence of the key events in this controversy. The most closely analogous state-law statute of limitations is that applied to actions for tortious interference with business relationships. A ten-year limitations period is applicable to such causes of action. *See* R.I.Gen.Laws § 9-1-13(a) (1997); *McBurney v. Roszkowski*, 687 A.2d 447, 449 (R.I.1997) (applying the ten-year limit to an action for tortious interference with a business relationship). Clearly, plaintiff's action falls well within the requirements of this rule. Therefore, this Court may address the substance of plaintiff's claim.

C. Liability of the Individuals

Plaintiff seeks to hold liable both Coleman and Lima for damages it suffered from defendants' alleged improper secondary boycotting. This effort was doomed from the start. The law on this question could not be more clear. Civil liability for damages resulting from

prohibited secondary pressure is premised upon 29 U.S.C. § 187. The grant of that right of action comes with an explicit proviso. The right to sue for damages is "subject to the limitations and provisions of section 185 of this title." *See* 29 U.S.C. § 187(b). Turning to § 185, even a less than diligent researcher discovers that "[a] money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." *See id.* § 185(b). Many courts have explained that on the basis of that quoted language, § 303 of the LMRA does not support individual liability. *See Prater,* 793 F.2d at 1207; *Charles D. Bonanno Linen Serv., Inc. v. McCarthy,* 708 F.2d 1, 8 (1st Cir.1983); *Cranshaw Constr. of New England, L.P.,* 891 F.Supp. at 673; *R.M. Perlman Inc. v. New York Coat, Suit, Dresses, Rainwear & Allied Workers' Union Local 89-22-1,* 789 F.Supp. 127, 133 (S.D.N.Y.1992); *see also Complete Auto Transit, Inc. v. Reis,* 451 U.S. 401, 414, 101 S.Ct. 1836, 68 L.Ed.2d 248 (1981) (explaining that in § 185 Congress intended to shield individuals from liability in LMRA § 301 and § 303 actions). Therefore, the Motions for Summary Judgment of Coleman and Lima are granted with respect to Count II of the Amended Complaint.

D. Liability of Local 254

Plaintiff has placed more than enough material facts in dispute to defeat the motion of Local 254 on the question of liability for improper secondary activity. According to the St. Peter affidavit, Coleman threatened to boycott Blue Cross unless it ceased doing business with Intercity. There is no dispute that Coleman acted as

Local 254's agent in this matter; he was in charge of the union's organizing efforts. There is also no dispute that Blue Cross was a secondary employer. Defendants have not argued that Blue Cross is an alter ego of Intercity or that Blue Cross effectively controlled the cleaning company.

Plaintiff has adduced sufficient evidence that Local 254 intended to involve Blue Cross in the Intercity labor dispute by employing prohibited organizing tactics. The St. Peter affidavit is itself sufficient to satisfy this element of the secondary boycott cause of action. When warned by St. Peter that his threat of picketing Blue Cross constituted prohibited secondary activity, Coleman brazenly responded that he didn't care. But there is more evidence from which this Court easily can infer an intent to exert unlawful pressure. During his deposition, Bouthillette explained that Lima, also an authorized agent of Local 254, told him during a recorded phone conversation that Local 254 would contact Blue Cross in order to sabotage Intercity's relationship if the cleaning company did not accede to the union's wishes. This testimony is bolstered by the transcriptions of those calls. Bouthillette's conversation with Lima provides insight into Local 254's reasons for calling St. Peter and corroborates St. Peter's statement. *See Abreen Corp.*, 709 F.2d at 756 (holding that a union official's comments may be used to infer the object of union activity). The evidence presented by plaintiff is not subtle; it reveals a transparent intention by Local 254 to pressure Blue Cross improperly.

The threat to St. Peter also satisfies the coercion element of a secondary pressure cause of action. Coleman's promise to picket Blue Cross epitomizes the classic

description of coercion within the labor law context. *See NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 687, 71 S.Ct. 943, 95 L.Ed. 1284 (1951) (describing the classic forms of unlawful secondary activity). Plaintiff alleges that Blue Cross was cowed by these threats of labor disturbance and eventually choose [sic] to jettison Intercity rather than endure further troubles from Local 254. Bouthillette has testified that Leite admitted as much to him when he informed the Intercity president that the cleaning contract would not be automatically renewed. Whether there was a causal relationship between Intercity's loss of the Blue Cross contract and the threats of Local 254 is a matter reserved for the trier of fact. Therefore, Local 254's Motion for Summary Judgment with respect to Count II of the Amended Complaint is denied.

E. Liability of the International

Plaintiff attempts to hoist liability up one more rung of the union hierarchy. The International, according to the Amended Complaint, must also answer for Intercity's damages resulting from Local 254's alleged improper secondary activity. Plaintiff argues that the International encouraged, ratified, and knowingly tolerated Local 254's prohibited behavior. However, the evidence adduced by plaintiff fails to support this argument.

Liability for a local union's actions does not attach to an international affiliate merely because of the hierarchical link between the two unions. *See Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 216-17, 100 S.Ct. 410, 62 L.Ed.2d 394 (1979). Rather, a plaintiff must satisfy the traditional rules of agency law to saddle an international

union with responsibility for acts carried out directly by a local in violation of § 303 of the LMRA. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 736, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (holding that § 303 liability is established according "to ordinary doctrines of agency"); *see also* 29 U.S.C. § 185(e). The United States Court of Appeals for the First Circuit explained that to hold an international union liable for the improper secondary activity of a local, a plaintiff must "show that the local acted as the international's agent or that the international independently participated in the unlawful conduct." *Borowiec v. Local No. 1570*, 889 F.2d 23, 26 (1st Cir.1989); *see Abreen Corp.*, 709 F.2d at 757; *see also Cranshaw Constr. of New England, L.P.*, 891 F.Supp. at 673 ("To be liable under § 303, a union must have instigated, supported, ratified, or encouraged the complained-of activity. . . . ").

Plaintiff's evidence fails completely to establish a factual link between the specifically alleged acts of secondary activity and any officer or agent of the International. There is no evidence in the record that any officer of the International actively participated in the threats made to Blue Cross. The only direct evidence of conduct prohibited by § 303 adduced by plaintiff is contained in St. Peter's description of Coleman's telephone threat. However, St. Peter makes no mention of the International. Neither Coleman nor Lima, Local 254's point men for the Intercity campaign, even hint at participation by the International. Plainly, Intercity cannot identify a genuine dispute of material fact regarding actual participation by the International.

Plaintiff fares no better by relying on theories of agency law. No evidence in the record establishes an

express agency relationship between the International and Local 254 in organizing matters. In fact, the International's Constitution and Bylaws explicitly limits the International's liability to those acts expressly authorized by the International's governing body. Furthermore, according to Buckley, the International's regional official, the scheme of decentralized power within the SEIU grants Local 254 independent authority in matters involving organizing.

Apparent agency is another fruitless theory propounded by plaintiff. Turning to bedrock agency law, "[a]pparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." *Restatement (Second) of Agency* § 8 (1958). To create such authority "the principle . . . must manifest to the third party . . . that he or she 'consents to have the act done on his [or her] behalf by the person purporting to act for him [or her].' " *Parrillo v. Chalk*, 681 A.2d 916, 919 (R.I.1996) (quoting *Restatement (Second) of Agency* § 27). A third party may properly rely on an apparent authority relationship if that party's belief in the principal's authorization of the agent was reasonable. *See Paul Revere Life Ins. Co. v. Fish*, 910 F.Supp. 58, 64 (D.R.I.1996) (applying Rhode Island law). Plaintiff has failed to identify any act taken by the International and known to Intercity or Blue Cross that would lead a reasonable person to believe that Lima, Coleman, or Local 254 acted as the International's agent with respect to organizing

matters. Statements made by Lima or Coleman to Bouthillette identifying themselves as agents of the International are insufficient to establish apparent authority. The agency relationship is created by the manifestations of the principal, not of the alleged agent. *See Parrillo*, 681 A.2d at 919.

Nevertheless, plaintiff argues that the International did act in several ways that created an agency relationship binding on the International. It is unclear from plaintiff's argument whether it advocates that these actions established an express or an apparent authority relationship. That ambiguity is academic. None of the actions of the International spotlighted by plaintiff has any legal significance to the agency analysis.

First, plaintiff notes that the International subsidized Local 254's organizing campaign for janitorial workers to the tune of $10,000 per month for several months. Left unmentioned by plaintiff, however, is that the subsidy program ended six months before Local 254 began its efforts to unionize Intercity. Furthermore, there is no evidence that any official of Intercity or Blue Cross was aware of the subsidy before it was unearthed during the discovery process. Consequently, there could have been no reliance on the subsidy as a manifestation of an apparent agency relationship.

The subsidy also is not evidence of an express agency relationship. Although the International requested the most basic of periodic reports on the use of the funds, the evidence in the record is clear that the International never controlled the tactics used by Local 254 or advised the local on organizing strategy. Plaintiff has failed to adduce

any evidence that the International even knew of Local 254's tactics. An agency relationship may not be constructed on the basis of mere "normal union functions" such as reporting general activities to an affiliate. *Gibbs*, 383 U.S. at 738, 86 S.Ct. 1130; *see Federal Prescription Serv., Inc. v. Amalgamated Meat Cutters*, 527 F.2d 269, 276-77 (8th Cir.1975) (involving reporting between a local and an international union). Therefore, the subsidy is irrelevant to the question of agency in the Intercity organizing campaign.

Likewise, the International's resolution of a jurisdictional dispute between Local 254 and Local 134 has no bearing on this question. Plaintiff endeavors to show that in granting Local 254 jurisdiction over Providence-area cleaners, the International assumed the position of principal for all of the local's actions. However, it is well established in the field of labor law that the exercise of supervisory powers by an international union in some matters of jurisdiction and governance is insufficient to establish a general agency relationship between the international and a local for all other matters. *See Rodonich v. House Wreckers Union Local 95*, 817 F.2d 967, 974 (2d Cir.1987). The *Borowiec* Court rejected an argument similar to the one advanced here by plaintiff. In that case, the Court held that supervisory control by an international union over some aspects of a local union's governance does not subject the international to liability for the local's organizing activity where the local was afforded significant autonomy in many areas of its operations, including organizing. *See Borowiec*, 889 F.2d at 28. In the

case sub judice, Local 254 enjoys autonomy in the conduct of its organizing activities according to the undisputed testimony of Buckley. Plaintiff's argument based on the jurisdictional settlement must fail.

Next, plaintiff clings to a meaningless scrap of evidence for support of a ratification theory. In June 1995, Sullivan sent a letter to the International's president informing him that Intercity had been "expelled" from Blue Cross. Plaintiff urges this Court to turn the law of ratification on its head by concluding that a letter from Local 254 to the International can have the effect of associating the International to prior acts of Local 254 described in summary fashion in the letter. Clearly, the letter can reasonably have no such effect. The Supreme Court has counseled that "it would be inconsistent with the fabric of national labor policy to infer ratification from the mere fact that [the international union] involved itself in the dispute after the violence had occurred." *Gibbs*, 383 U.S. at 738, 86 S.Ct. 1130. Here, plaintiff's evidence fails even to demonstrate that the International "involved itself" after the fact. This Court will not resort to such an attenuated inference based on the paltry evidence of Sullivan's letter.

Finally, plaintiff hopes to pin liability on the International based on a theory of "knowing tolerance." According to this argument, the International should have known that Local 254 used improper secondary boycott tactics when it attempted to organize Aid Maintenance. Stretching an assumption into a precarious theory of liability, plaintiff maintains that having done nothing to dissuade the local from using prohibited tactics after the Aid Maintenance dispute, the International is responsible

for Local 254's use of those same improper means of organizing Intercity. This reasoning suffers from several flaws.

First, no evidence in the record supports the contention that officials of the International were aware of acts of illegal secondary activity committed by agents of Local 254 in organizing Aid Maintenance. Plaintiff cannot rely on a theory of "knowing tolerance" when it has produced no evidence that officials of the International had knowledge of improper activities committed by Local 254 at any time. Second, no rule of law required the International to condemn improper acts committed by a local union with which it had no agency relationship for organizing matters. *See Gibbs*, 383 U.S. at 739, 86 S.Ct. 1130 ("There can be no rigid requirement that a union affirmatively disavow such unlawful acts as may previously have occurred."). For either of these reasons, plaintiff's final argument for International liability fails. Therefore, the Motion for Summary Judgment by the International on Count II of the Amended Complaint is granted.

III. Supplemental Jurisdiction

With the secondary boycott claim against the International and the two individual defendants resolved, no federal cause of action remains against these three defendants. Because plaintiff has not alleged diversity of the parties, this Court can only base subject matter jurisdiction over plaintiff's state law claims against these three parties under the supplemental jurisdiction provision of 28 U.S.C. § 1367. That statute provides that

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). Supplemental jurisdiction extends to pendent parties as well as pendent claims. *See id.* ("Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."). This Court has power to hear both state and federal claims if they all would ordinarily be expected to be tried in one judicial proceeding. *See Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 563-64 (1st Cir.1997); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 190 (1st Cir.1996). In particular, "[t]he state and federal claims must derive from a common nucleus of operative fact." *Gibbs*, 383 U.S. at 725, 86 S.Ct. 1130; *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1175 (1st Cir.1995).

However, the exercise of supplemental jurisdiction is discretionary. *See Penobscot*, 112 F.3d at 564; *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256-57 (1st Cir.1996). In determining whether to exercise this discretion, the district court should " 'take into account concerns of comity, judicial economy, convenience, fairness, and the like.' " *Penobscot*, 112 F.3d at 564 (quoting *Roche*, 81 F.3d at 257). The supplemental jurisdiction statute itself provides four grounds for declining the exercise of this jurisdiction:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

This Court can identify no compelling reason to decline supplemental jurisdiction over the state law claims advanced by plaintiff. The causes of action involved, tortious interference, defamation, and false light, are of the rather ordinary variety. This Court has considerable experience applying the well-worn rules of Rhode Island law in these areas. Despite the presence of these several state law claims, the federal claim of improper secondary pressure still predominates in this dispute. The state torts are ancillary to the central controversy regarding the quality and kind of defendants' unionization struggle with Intercity. Furthermore, given this Court's significant investment of time in deciding a number of preliminary issues in this long-running litigation, the interests of judicial economy militate in favor of the exercise of supplemental jurisdiction. Therefore, this Court will now address the viability of these state law actions.

IV. The Tortious Interference Claims

Two of plaintiff's state law claims invoke the law of tortious interference with business relationships. In the first of these, plaintiff contends that defendants tortiously interfered with Intercity's contract to provide janitorial services to Blue Cross. The second claim is a gloss on the first. Plaintiff argues that defendants tortiously interfered with Intercity's advantageous business relationship with Blue Cross. The strongest argument raised by defendants in rebuttal calls into doubt the sufficiency of plaintiff's evidence of causation. However, this Court need not test the merits of this pair of claims because both are pre-empted by federal labor law.

State law may not encroach upon the system of federal laws governing labor relations; local laws that attempt to occupy the same or similar ground as the national scheme are preempted. *See Morton*, 377 U.S. at 259-60, 84 S.Ct. 1253. Federal predominance in this area is necessary to ensure that "the balance of power between labor and management expressed in our national policy" is not upset. *Id.* at 260, 84 S.Ct. 1253. Preemption is necessary "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Claims of tortious interference with contractual relations,[4] when based on conduct that is

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[4] The two types of tortious interference alleged by plaintiff are equivalent causes of action for the purposes of preemption analysis. Although Rhode Island law recognizes as independent

regulated by the LMRA, are subject to the preemption doctrine. *See BE&K Constr. Co.*, 90 F.3d at 1330 (preempting state law tortious interference claim); *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238, 240-41 (7th Cir.1996) (same); *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1381 (1st Cir.1981) (preempting federal common law claim of tortious interference).

Plaintiff readily acknowledges the authority of this general rule. However, Intercity urges that its claim fits within a well-established exception to the federal preemption doctrine carved out by the United States Supreme Court in its *San Diego Building Trades Council* decision. According to the Court, states may "grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order." *San Diego Bldg. Trades Council*, 359 U.S. at 247, 79 S.Ct. 773; *see Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 136, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976). Violence alters the federalism balance and trumps the interests of preemption because of the "compelling

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actions claims of tortious interference with contract and tortious interference with advantageous business relations, only one element, irrelevant for preemption purposes, separates the two. *See Mesolella v. City of Providence*, 508 A.2d 661, 669-70 (R.I.1986) (explaining that a plaintiff need not prove the existence of a contract when the claim is based on interference with a prospective business relationship); *Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 51 F.Supp.2d 81, 101 (D.R.I.1999) (explaining that "the legal requirements for establishing these two torts are identical" except for the difference identified in *Mesolella*).

state interest in the maintenance of domestic peace." *Gibbs*, 383 U.S. at 721, 86 S.Ct. 1130. Furthermore, state regulation of such activity, outside of the bounds of conduct protected by the federal labor laws, does not compromise the national scheme of labor relations policy. *See San Diego Bldg. Trades Council*, 359 U.S. at 247, 79 S.Ct. 773. Violent picketing is "[t]he paradigmatic example" of conduct that may be actionable under state law. *Palm Beach Co. v. Journeymen's & Prod. Allied Servs.*, 519 F.Supp. 705, 713 (S.D.N.Y.1981). However, courts have allowed state law causes of action alleging other types of violent activity to proceed as well, including claims based on sabotage and vandalism. *See Printpack, Inc. v. Graphic Communications Union, Local 761-S*, 988 F.Supp. 1201, 1204 (S.D.Ind.1997) (involving sabotage); *Cranshaw Constr. of New England, L.P.*, 891 F.Supp. at 675 (involving vandalism).

This limited exception is inapplicable to plaintiff's claim because the only threats of violence found within the record were directed at Bouthillette and were entirely unrelated to Blue Cross. Plaintiff does not allege that defendants committed any acts of actual violence. Instead, plaintiff directs the Court's attention to comments made by Lima, and by others alleged to be Lima's associates, to Bouthillette and to Bouthillette's secretary. For instance, one of plaintiff's phone call transcriptions records Lima warning that he knows where Bouthillette lives. Bouthillette also testified at his deposition that Lima boasted about his access to "Latino terrorist organizations" employed to enforce the union's will. Based on these and similar allegations, Bouthillette received a

restraining order against Lima and others working on Lima's behalf.

The problem with plaintiff's argument is apparent. None of the threats attributed to defendants are in any way related to Intercity's relationship with Blue Cross. There is no evidence that any official of Blue Cross was ever threatened with violence. Furthermore, there is no evidence that Blue Cross officials were even aware of the threats allegedly directed at Bouthillette. Plaintiff may not escape the impact of the important federal policy of preemption by alleging threats of violence that are totally irrelevant to its state cause of action.

The *Gibbs* Court emphasized the limited nature of the violence exception. In that case the Court agreed with the petitioner that "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity." *Gibbs*, 383 U.S. at 729, 86 S.Ct. 1130. Restating its holding from a previous decision, the Court continued by stressing the centrality of causation to this preemption exception. A state law cause of action may proceed only when there exists "a proximate relation between the violence and threats of force and violence complained of, on the one hand, and the [damages] allegedly suffered, on the other." *Id.* at 730, 86 S.Ct. 1130.

Although causation is typically a matter within the jury's realm, this Court recently recognized that "a court may properly intervene" if plaintiff fails entirely to adduce evidence supporting this vital element. *See Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 51 F.Supp.2d 81, 101

(D.R.I.1999) (citing *Russo v. Baxter Healthcare Corp.*, 140 F.3d 6, 12 (1st Cir.1998)). No evidence within the record would permit any finder of fact to conclude that the threats alleged by plaintiff caused Blue Cross to end its business relationship with Intercity. The only evidence of violence adduced by plaintiff is irrelevant to these two tort counts. Consequently, the two state causes of action for tortious interference do not fit within the narrow confines of the violence exception to the general preemption rule. Therefore, the preemption doctrine applies to both counts. Defendants' motions as to Counts I and III are granted.

V. The Defamation Claims

A. Defamation Law in the Labor Context

Counts IV and V of the Amended Complaint allege that defendants defamed Intercity through various communications with Blue Cross and Women & Infants. Plaintiff contends that statements made by defendants to Blue Cross "implied that Intercity conducted its business in an unlawful and unsanitary manner endangering Blue Cross and its patrons and employees." Amended Complaint ¶ 58. Similarly, the pleading argues that statements made to patrons and employees of Women & Infants also implied that Intercity "conducted its business in an unlawful and unsanitary manner, spreading infectious diseases endangering Women and Infants and its patrons and employees." Amended Complaint ¶ 64. The offending statements, discussed in detail above, were contained in two letters penned by Coleman and sent to a Blue Cross official and three handbills created by Local 254

and distributed to the public near a Women & Infants facility.

To avoid defamation liability, defendants first seek the shelter of the preemption doctrine. This effort is futile. In *Linn v. United Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), the United States Supreme Court held that a state law defamation action is not preempted by the LMRA "provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Id.* at 61, 86 S.Ct. 657. Federal preemption in such cases is inappropriate because of the "overriding state interest in protecting . . . residents from malicious libels." *Id.* The key to this particular species of preemption analysis is malice. Causes of action based on state law are preempted to the extent to which they seek to make actionable defamatory statements that were made without malice. *See Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 272-73, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

The malice rule imposed by *Linn* reflects the Supreme Court's desire to preserve the special status of free speech rights under federal labor law. *See Old Dominion*, 418 U.S. at 272, 94 S.Ct. 2770. Concern for "unwarranted intrusion upon free discussion envisioned by the" labor laws led the Court to fashion limits on the reach of state defamation actions. *Linn*, 383 U.S. at 65, 86 S.Ct. 657. The *Linn* Court explained that "[l]abor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions." *Id.* at 58, 86 S.Ct. 657. In contrast to such

state laws, federal labor law "tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees." *Id.* at 61, 86 S.Ct. 657. But the line is drawn at malicious defamation. Therefore, to serve both the objectives of federal labor law and state anti-defamation law, the Court imported into the labor context the standards for defamation actions involving public figures enunciated by the Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

The *Sullivan* standard requires that a plaintiff prove that a publication was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 280, 84 S.Ct. 710; *see Old Dominion*, 418 U.S. at 281, 94 S.Ct. 2770 (applying the *Sullivan* test to a labor dispute). This is the definition of malice applicable in the case sub judice. Whether defendants harbor any ill will or spite toward plaintiff is irrelevant to this analysis. *See Old Dominion*, 418 U.S. at 281, 94 S.Ct. 2770.

Given the special role of the federal government in promoting national labor policy, the Supreme Court has attempted to provide the lower courts with some guidance in determining whether certain specific statements are protected from state condemnation when made in the heat of a labor dispute. Much of the hyperbolic language typical of bitter struggles between zealous organizers and defiant managers is protected by federal law. Language that might ordinarily offend the civility of polite company is tolerated and absolutely protected by law within the labor context. "[F]ederal law gives a union license to use intemperate, abusive, or insulting language without

fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Old Dominion*, 418 U.S. at 283, 94 S.Ct. 2770. Even the "most repulsive speech enjoys immunity" if its speaker passes the malice test. *Linn*, 383 U.S. at 63, 86 S.Ct. 657. For example, the Court has protected union defendants from liability for using terms such as "scab," even when the word was defined in the publication as a person with "rotten principles" who lacks "character" and for whom "Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out." *See Old Dominion*, 418 U.S. at 268, 283-84, 94 S.Ct. 2770 (quoting union literature attributed to the author Jack London).

The shield of federal immunity extends even beyond instances of abusive language and name calling to "loose language" and exaggerated use of slogans. *Id.* at 284, 94 S.Ct. 2770. For example, labeling a union opponent a "traitor" or "fascist" is generally a protected act. *See id.* Even though a defendant cannot prove that its target fits the legal or common definitions of these words, the statements are not actionable because they are properly understood as expressions of opinion and not of fact. *See id.* "[T]o use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies – like 'unfair' or 'fascist' – is not to falsify facts." *Cafeteria Employees Union Local 302 v. Angelos*, 320 U.S. 293, 295, 64 S.Ct. 126, 88 L.Ed. 58 (1943).

Many of the statements made by defendants that form the basis of plaintiff's grievance fall well within the immunized category of "rhetorical hyperbole." They are simply "lusty and imaginative expression[s] of the contempt felt by union members" towards a stubborn owner.

Old Dominion, 418 U.S. at 286, 94 S.Ct. 2770. So protected are the references in the handbills distributed at the Women & Infants facility to "bloodsucking, plantation-minded boss," "notorious company," "the Intercity plague," the Intercity "infestation," and Intercity's "sweatshop conditions." Also protected as a matter of opinion is the statement in the March 20, 1995 letter to Bouthillette and Leite that "a health emergency exists" at both Blue Cross and Women & Infants based on Intercity's lax procedures in handling hazardous materials. This statement might refer to any number of conditions at the work site and is not a matter that can be proved or disproved by resort to objective data.

More problematic for defendants are specific statements made in the first letter sent on March 20, 1995 and in two of the handbills distributed at Women & Infants. These remaining statements can be divided into two categories: one set relates to wages and benefits provided Intercity employees and the other relates to the health and safety conditions under which Intercity employees work.

With regard to the statements in the first group, there are some triable issues of fact that this Court is unable to resolve at this stage of the litigation. Although the statement that Intercity does not pay a "living wage" is a protected matter of opinion, the statement that the company pays its employees "well below area standards" is an assertion of fact that can be verified by objective data. Bouthillette contends that Intercity paid its employees above area standards. Coleman testified at his deposition that the statement was based on his assumption that Intercity employees working at Women & Infants were

paid comparably to those working at Blue Cross. However, he admits that little, if any, investigation was conducted prior to publishing the statements. The relevant portions of Coleman's deposition testimony follow:

> Q.: At the time that you prepared and distributed this handbill, you did not have that information as to what Intercity was paying its janitorial workers assigned to Women and Infants?
>
> A.: That's correct. I hadn't talked to the people there.
>
> Q.: And so, you published and prepared this document in disregard as to what the actual facts were with respect to Intercity's employees –
>
> A.: Well, I published –
>
> . . . .
>
> Q.: – assigned to Women and Infants?
>
> . . . .
>
> A.: Well, I published it in regards to whatever information was available to me that I could put in it.
>
> Q.: But you didn't have any information about what the compensation and benefits were of Women and Infants employees – of strike – at the time you prepared Plaintiff's 12, you just told us that you didn't have any information about the terms and conditions of employment of Intercity's workers assigned to Women and Infants?

A.: Well, I made an assumption that they were probably paid similarly as they were paid at Blue Cross.

Q.: And that assumption was not based on facts?

. . . .

A.: It was an assumption. That's correct.

A genuine dispute as to the truth of these statements regarding wages exists. The evidence regarding holiday pay, vacation time, health insurance, and job security rights is similarly disputed. These conflicts in the record over material facts cannot be resolved on the motions before the Court. Furthermore, even if proved to be false, the question of malice is too close a call for this Court to make now given Coleman's shaky testimony about his efforts to investigate the facts.

In the second group of actionable statements are allegations concerning the adequacy of Intercity's safety program. By declaring Intercity in violation of federal and state laws, Local 254 left behind the realm of opinion and assumed the position of a reporter of fact. Statements intended to be factual representations of Intercity's health and safety record were contained in both the letters to Leite and in one of the handbills. The first letter from Coleman, copied to Leite, made the following factual assertions regarding Intercity's employment practices at the Blue Cross site: 1) Intercity was in violation of both federal and state laws by failing to provide safety manuals and approved training to its employees, 2) Intercity was in violation of the Blood Born Pathogen Act by

exposing its workers to hazardous human waste, 3) Intercity failed to provide its employees with appropriate safety equipment and clothing. One of the handbills also contains the factual representation that Intercity exposes its workers at the Women & Infants site to "chemical and biological hazards including HIV and Hepatitis B virus." In an affidavit, Bouthillette denies that Intercity was ever in violation of federal or state law and asserts that the company provided its employees with appropriate training and equipment. Therefore, there is a triable issue of material fact with respect to the falsity of these statements.

There is also some evidence that these statements were made with malice. According to his deposition testimony, before writing the letters to Leite, Coleman never actually investigated the working conditions of Intercity employees at the Women & Infants site. To the contrary, he substituted assumption for actual observation. Coleman assumed that conditions at Women & Infants were equivalent to those at Blue Cross. Compounding the problem, Coleman's testimony raises a serious question regarding the extent of his investigation into working conditions at Blue Cross, the very conditions that underlie his assumptions about the Women & Infants site. The relevant portion of his deposition follows:

> Q.: In Plaintiff's Exhibit 12, you state Intercity exposes its cleaners to chemical and biological hazards, including HIV and Hepatitis B virus?
>
> A.: Yes, I did.
>
> Q.: Upon what information did you base that statement?

A.: Based on the fact that he doesn't provide rubber gloves to his cleaners.

Q.: How do you know that at the time you wrote this?

A.: From my observations as to his practices at Blue Cross.

Q.: But at the time you didn't locate or secure any of Intercity's workers at Women and Infants?

A.: That's correct. Yes, it was an assumption.

Q.: And the assumption that you made was not based upon facts?

. . . .

A.: It is, yeah, you could say that.

Q.: And it was not made based upon an investigation?

A.: Well –

. . . .

Q.: – of Intercity workers at Blue Cross?

A.: As best I could investigate.

Q.: And the investigation was never concluded?

A.: No. I didn't actually – wasn't able to locate the people.

Q.: And despite that, you made all of the statements set forth –

A.: Yes.

Q.: – in Exhibit 12?

. . . .

A.: Yes.

Based on this evidence, plaintiff has demonstrated that a genuine dispute of material fact exists regarding Coleman's malicious intent in making these statements.

B. Liability for the Defamation Claims

Liability for these alleged defamations does not extend to all of the defendants named in plaintiff's lawsuit. Clearly, Coleman is responsible for the statements in his letter of March 20, 1995 alleging safety violations by Intercity. Local 254 is liable as a principal for the statements made by Sullivan and Coleman regarding Intercity wages and benefits as well as safety violations. However, there is no evidence in the record linking any of the actionable statements to Lima. Therefore, of these three defendants, only Lima is entitled to summary judgment on Counts IV and V.

The liability of the International deserves a special, if brief, discussion. The standard of proof for imposing liability on an international union for the acts of a local affiliate that may violate state law is more demanding than the traditional rule of civil liability. Under § 6 of the Norris-LaGuardia Act:

> No officer or member of any association or organization . . . participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts,

> or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106. Although the normal rules of agency law apply to determine the liability of a union for acts of secondary boycotting by affiliate unions, the special standard of § 6 applies to state law actions such as the defamation claims before the Court. *See Gibbs*, 383 U.S. at 736, 86 S.Ct. 1130 (explaining the application of the different standards of liability for § 303 actions and state law actions). The "clear proof" rule is a "higher" standard for imposing liability than that provided by traditional agency law. *Johnson v. Teamsters Local 559*, 102 F.3d 21, 27 (1st Cir.1996). The *Gibbs* Court explained that in order to satisfy this heightened standard, a plaintiff "is required to persuade by a substantial margin, to come forward with 'more than a bare preponderance of the evidence to prevail.' " *Gibbs*, 383 U.S. at 737, 86 S.Ct. 1130 (quoting *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943)).

Given this exacting standard and this Court's previous discussion of the lack of evidence associating the International to any of the acts of Local 254, plaintiff cannot maintain causes of action for defamation against the International. To link the International to the statements at issue, plaintiff relies on the same evidence that this Court deemed inadequate to hold the International liable under § 303. Plaintiff identifies no additional evidence supporting liability of the International. Therefore, even under traditional agency principles, plaintiff cannot establish the liability of the International, to say nothing of the problems facing plaintiff under the clear proof

standard. The International's Motion for Summary Judgment as to Counts IV and V is granted.

VI. The False Light Claim

Plaintiff further seeks to hold defendants liable under the Rhode Island Privacy Act, R.I.Gen.Laws § 9-1-28.1, for publicly portraying Intercity in a false light. The Rhode Island statute allows a false light action when "[t]here has been some publication of a false or fictitious fact which implies an association which does not exist" and when "[t]he association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances." R.I.Gen.Laws § 9-1-28.1(a)(4)(i).

The Rhode Island legislature borrowed the Privacy Act's scheme of four privacy torts, including the tort of false light, from the doctrine of privacy torts promulgated by the *Restatement (Second) of Torts*. *See Liu v. Striuli*, 36 F.Supp.2d 452, 479 (D.R.I.1999); *Restatement (Second) of Torts* §§ 652B-E (establishing the four privacy torts). Accordingly, Rhode Island courts have often turned to the *Restatement* as an authority on the matter of privacy torts. *See Swerdlick v. Koch*, 721 A.2d 849, 861-62 (R.I.1998); *Pontbriand v. Sundlun*, 699 A.2d 856, 863 (R.I.1997). The *Restatement* defines the scope of the right to privacy: "Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded." *Restatement (Second) of Torts* § 6521. Under this rule of tort law, a corporation does not enjoy privacy rights. *See id.* cmt. c. "It has therefore no cause of action for any of the four forms of invasion covered by §§ 652B to 652E." *Id.; see id.*

§ 652E (false light tort). Given the respect with which the Rhode Island state courts accord the *Restatement* on matters of privacy law otherwise unresolved by state law, this Court has no qualms in concluding that the Rhode Island courts would adopt the *Restatement*'s rule on corporate privacy. Therefore, Count VI of the Amended Complaint fails as a matter of law.

VII. Punitive Damages

Finally, this Court will address defendants' argument that plaintiff may not recover punitive damages in this lawsuit. The only causes of action remaining are those for improper secondary activity under 29 U.S.C. § 187 and for defamation under Rhode Island common law. Plaintiff may not recover punitive damages on its claim of unlawful secondary activity. *See International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 52, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979); *Morton*, 377 U.S. at 260-61, 84 S.Ct. 1253; *Amoco Oil Co. v. Local 99, Int'l Bhd. of Elec. Workers*, 536 F.Supp. 1203, 1224 (D.R.I.1982). As the LMRA makes clear, plaintiff's recovery for unlawful secondary pressure is limited to compensatory damages. *See* 29 U.S.C. § 187(b) ("Whoever shall be injured in his business or property . . . shall recover the damages by him sustained. . . . "); *Morton*, 377 U.S. at 260, 84 S.Ct. 1253 (holding that recovery is limited "to actual, compensatory damages"). Accordingly, defendants' Motions for Summary Judgement with respect to the punitive damages claims contained in Count II of the Amended Complaint are granted.

However, punitive damages are available for the defamation claims. As this Court discussed above, federal labor law does not preempt this state law cause of action. Under Rhode Island law, punitive damages may be recovered in defamation suits. *See Johnson v. Johnson*, 654 A.2d 1212, 1217 (R.I.1995). Such exemplary damages must be based on a finding of malice or bad faith. *See Palmisano v. Toth*, 624 A.2d 314, 318 (R.I.1993). This Court had occasion recently to address the standard for an award of punitive damages under Rhode Island law in *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 182 F.R.D. 386, 400 (D.R.I.1998). In that decision, this Court explained that "[t]he Rhode Island Supreme Court has discussed with approval this Court's formulation of the test: the plaintiff must allege that the defendant intended to cause harm." *Id.*

Given the evidence currently in the record, this Court can only conclude that a dispute of material fact exists regarding the "willfullness, recklessness or wickedness" of the defendants in making the offending statements. *Sherman v. McDermott*, 114 R.I. 107, 329 A.2d 195, 196 (1974). There is some evidence that Local 254, Lima, and Coleman wished to drive Intercity out of business. If the offending statements were made to damage plaintiff for the sake of causing it harm, then plaintiff may recover exemplary damages. Such a determination, necessarily entangled in questions of credibility and motivation, is not an appropriate matter for summary judgment disposition given the varying accounts of the circumstances surrounding this dispute. Defendants' Motions for Summary Judgment with respect to the requests for punitive damages within Counts IV and V of the Amended Complaint are denied.

CONCLUSION

For the foregoing reasons, defendants' Motions for Summary Judgment are granted in part and denied in part. The Motions of all defendants are granted with respect to Counts I, III, and VI of the Amended Complaint. On Count II of the Amended Complaint, the Motions of the International, Lima, and Coleman are granted and the Motion of Local 254 is denied. On Counts IV and V of the Amended Complaint, the Motions of the International and Lima are granted and the Motions of Local 254 and Coleman are denied. Finally, plaintiff's claim for punitive damages contained in Count II of the Amended Complaint is dismissed. No judgments shall enter until all claims are resolved.

It is so ordered.

29 U.S.C. § 158

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in

section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership

therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is -

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by

a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless

an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract

shall terminate or modify such contract, unless the party desiring such termination or modification -

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a)

of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall

participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible[1] and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of

---

[1] So in original. Probably should be "unenforceable".

a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in

opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or

agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

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WOMEN AND INFANTS' TICKS US OFF

INTERCITY MAINTENANCE COMPANY is an infestation that sucks the blood of Latino workers. Janitors at Women and Infants' Hospital are human beings and should not be treated as animals. INTERCITY has infected its cleaners as follows:

INTERCITY does not pay a living wage

INTERCITY does not pay Holiday pay

INTERCITY does not pay health insurance

INTERCITY exposes its cleaners to chemical and biological hazards including HIV and Hepatitis B virus

WE DEMAND JUSTICE FOR JANITORS!

STOP THE SPREAD OF THE INTERCITY PLAGUE!!

[LOGO]

Service Employees International Union Local 254, AFL-CIO, CLC

Edward T. Sullivan, Jr., Business Manager

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LOCAL 254
SEIU-AFL/CIO

[SEAL]

Service Employees International Union Local 254,
AFL-CIO, CLC

March 31, 1995

Dear Women and Infants' Workers and Patrons:

Let me take this opportunity to explain our activity here at the Hospital over the last few days. Our initial beef is with a notorious company called Intercity Cleaning and its President, Michael Bouthilette, who the Hospital has contracted with to provide certain cleaning services.

Recognizing that this is a Union Hospital, the fact that Women and Infants now contracts with an anti-Union contractor should be of particular concern. Intercity Cleaning and its boss, Mike Bouthilette, pay its workers well below area standards, with literally no health insurance, paid holidays, vacation, pension, or job security rights. Intercity has turned back the clock, infesting your shop with the kind of sweatshop conditions you and your Unions fought so hard to exterminate.

Our intentions here at Women and Infants is to stop the spread of the Intercity Plague and protect your workplace from sweatshop infection. We regret that the Hospital's insensitivity to the plight of Intercity workers forced us to involve you in this dispute, but, as you well know, sometimes dramatic measures are necessary to gain attention.

Thank you for your support, and we will gladly provide documentation to support any of the facts presented in this letter.

In Solidarity,

/s/ Edward T. Sullivan
Edward T. Sullivan, Jr.
Business Manager

ETS/lbm

Edward T. Sullivan, Jr., Business Manager

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(2)

No. 00-1764

IN THE
Supreme Court of the United States

INTERCITY MAINTENANCE CO.,
Petitioner,

v.

LOCAL 254, SERVICE EMPLOYEES INTERNATIONAL UNION;
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO;
VICTOR LIMA; DONALD COLEMAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT LOCAL 254, SERVICE EMPLOYEES INTERNATIONAL UNION

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13 pp

QUESTION PRESENTED

The Petition for Writ of Certiorari incorrectly states the questions presented for review. Respondent Local 254 submits that only the following question is presented:

> Whether the First Circuit Court of Appeals correctly held under *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 58 n.2, 64-65 (1966) that a defamation plaintiff in a labor dispute may not rely on presumed damages under state law, but rather must prove actual harm by showing the severity of the harm resulting from a libel in order to recover either compensatory or punitive damages.

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IN THE

Supreme Court of the United States

No. 00-1764

INTERCITY MAINTENANCE CO.,
Petitioner,

v.

LOCAL 254, SERVICE EMPLOYEES INTERNATIONAL UNION; SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR LIMA; DONALD COLEMAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT LOCAL 254, SERVICE EMPLOYEES INTERNATIONAL UNION

STATEMENT OF THE CASE

The Petition arises from a lawsuit by Intercity Maintenance Corporation (Intercity), a nonunion janitorial service, against the Service Employees International Union (SEIU), its local affiliate (Local 254), and two Local 254 employees, Donald Coleman and Victor Lima, for unlawful secondary activity in violation of § 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, and state law torts including two defamation claims. The district court granted summary judgment to the SEIU and Lima on all counts and to Coleman on all but the defamation claims. At the close of plaintiff's evidence at trial, the court granted judgment as a matter of law to Local 254 and

Coleman on the remaining defamation and LMRA claims. As to the defamation claims, the district court held that Intercity had proved malicious statements about Intercity but that "it would be sheer speculation for the jury to conclude that the plaintiff suffered some type of loss as a result of these libelous statements." Pet. App. 20-21.

The First Circuit Court of Appeals affirmed the summary judgment ruling and the FED. R. CIV. P. 50 ruling on the defamation claims, but remanded the LMRA claim for retrial. As to the defamation claims, the court held that *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 58 n.2, 64-65 (1966) required proof of actual harm, and that Intercity had failed, as a matter of law, to present sufficient evidence of harm:

> In explicitly requiring proof of harm, *Linn* preempts not only non-malicious libels, but also reliance on the common law presumption of damages in those jurisdictions where libel is actionable per se. [] Therefore, plaintiffs who endure even malicious libels during a labor dispute must present evidence of harm from defamation in order to recover, notwithstanding the law of states such as Rhode Island in which damages would otherwise be presumed. []
>
> Under *Linn*, Intercity could not rest on an unsubstantiated allegation of injury to its reputation. Having correctly concluded that *Linn* preempted Intercity from relying on the common law presumption of damages, the district court held that the evidence of actual loss due to reputational harm and consequent lost profits was insufficient as a matter of law. We agree that Intercity offered no more than a scintilla of evidence to prove losses stemming from diminished reputation.

Pet. App. 14-15 (citations omitted). In addition, the appeals court held that insofar as Intercity attempted to prove harm by showing that it later failed to win certain janitorial contracts, Intercity presented "no evidence" to show that the loss of contracts resulted from defendants' libels. Pet. App. 15.

Intercity has petitioned this Court for a writ of *certiorari*, claiming that the First Circuit Court of Appeals misconstrued *Linn*'s requirement that Intercity prove actual harm resulting from defamation in order to recover. The Petition argues variously that Intercity should have been able to rely on the presumed damages flowing from statements that are libelous *per se* under Rhode Island law to meet the actual harm requirement of *Linn* (Pet. Br. 6-10); that the First Circuit improperly required proof of special pecuniary losses to meet *Linn*'s harm requirement (Pet. Br. 10-15); and that the appeals court improperly applied *Linn*'s harm requirement to preclude Intercity receiving punitive damages (Pet. Br. 15-16).

ARGUMENT

This case involves neither a conflict with relevant precedents of this Court nor a conflict among the courts of appeal. Rather, the Petition reflects an unwarrantable invitation to overrule this Court's long settled, well reasoned precedent concerning federal labor law preemption of defamation claims by parties to a labor dispute. The First Circuit Court of Appeals properly applied this Court's controlling holding in *Linn* to find state law defamation claims preempted, including claims for punitive damages, because Intercity failed to prove actual harm of any kind.

1. The First Circuit Court of Appeals properly applied *Linn v. United Plant Guard Workers, Local 114* to foreclose Intercity's reliance on presumed damages under Rhode Island law.

In *Linn*, this Court squarely addressed the question of whether the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, preempted a libel claim under state law by an official of an NLRA employer seeking damages for defamatory statements published by a union and its officers during an organizing campaign. 383 U.S. at 55. The Court faced this issue against the background of its earlier holding that the NLRA broadly preempted state law regulation of conduct that the federal labor

statute "protects, prohibits, or arguably protects or prohibits." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241-44, 246 (1959).

The defamation claim in *Linn* arose from leaflets distributed during a representation campaign charging that a management official had "robbed" and lied to employees. 383 U.S. at 56. The complaint alleged no "actual or special damage," but sought a $1,000,000 award on the basis that the statements were libelous *per se*, an allegation this Court understood to indicate that the plaintiff was relying on presumed damages. *Id.* at 56, 58 n.2. In deciding the preemption issue, this Court clearly recognized that Congress through the NLRA intended "to encourage free debate on issues dividing labor and management" and that courts must consider such disputes "'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'" *Id.* at 62 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Organizing campaigns, in particular, this Court noted "are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Id.* at 58.

In this light, the *Linn* Court was particularly troubled that "the law in many States presumes damages from the publication of certain statements characterized as actionable *per se*," *id.*, a category of libel that "developed without specific reference to labor controversies," *id.* at 65. Consequently, this Court found that state jurisdiction should be limited to "redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false,"[1] *but in addition*, this Court

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[1] The Court adopted this first element of the standard for preemption "by analogy" with the constitutional malice standard announced in *New York Times Co. v. Sullivan*. *Id.* at 65. The Petition emphasizes that such malicious statements enjoy no Constitutional protection under the First Amendment.

expressly found preempted all claims that did not include proof of actual, as opposed to presumed, damages:

> As we have pointed out, certain language characteristic of labor disputes may be held actionable *per se* in some state courts. These categories of libel have developed without specific reference to labor controversies. However, even in those jurisdictions, *the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm.* This is a salutary principle. We therefore hold that *a complainant may not recover except upon proof of such harm*, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. The fact that courts are generally not in close contact with the pressure of labor disputes makes it especially necessary that this rule be followed. . . . . Likewise, the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages.

Id. at 61, 65-66 (emphasis supplied).

Because the *Linn* plaintiff had relied solely on presumed damages in his pleading, the Court directed that he should be given leave to amend his complaint to allege actual, compensable harm:

> Since the complaint here does not make the specific allegations that we find necessary in such actions, leave should be given Linn on remand to amend his complaint, if he so desires, to meet these requirements. In the event of a new trial he, of course, bears the burden of proof of such allegations.

Id. at 66.

Pet. Br. 6-8. But since *Linn* is based on federal, statutory preemption, not First Amendment protections, Petitioner's argument is here wholly misdirected.

The First Circuit Court of Appeals properly applied *Linn*'s actual harm requirement to Intercity's claim in this case. Pet. App. 14 -16. Like the plaintiff in *Linn*, Intercity seeks to rely on presumed damages to general reputation flowing from libel *per se* under state law. Although the Petition is less than clear on the point, this is the only harm on which Intercity *could* rely. Both the district court and the court of appeals found as a matter of law that Intercity had failed to present sufficient evidence of harm to general reputation to go to a jury. *Id.*, Pet. App. 20-21. In addition, both courts found that Intercity had failed to prove a causal nexus between any libels and Intercity's subsequent failure to win certain janitorial contracts. *Id.* Intercity does not seriously challenge either of these findings. Nor would any such challenge to a factual finding or alleged misapplication of law warrant this Court's review. SUP. CT. R. 10.

The courts of appeal have not split in interpreting *Linn*. In the three and a half decades since *Linn* was decided, no court of appeal has questioned or misapplied *Linn*'s harm holding. Rather, the Eleventh Circuit accurately summarized *Linn* on exactly the presumed harm point at issue here:

> The [*Linn*] court also held that even where under state law certain language may be actionable as libel *per se*, thus automatically entitling the plaintiff to damages, where federal labor policy is implicated, the complainant may not recover except upon proof of actual harm.

Pantex Towing Corp. v. Glidewell, 763 F.2d. 1241, 1248 n.7 (11th Cir. 1985); *see also Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1210-1211 (11th Cir. 1999) ("Florida law recognizes certain types of libels as 'libel per se,' meaning that injury is presumed and the plaintiff need not present evidence on the issue. [] Under federal law, however, a libel action arising out of a labor dispute requires proof of injury, regardless of state libel law" (cites omitted)).

Against this background, Petitioner attempts to raise an issue about the applicability of *Linn*'s harm requirement by reverting to assorted district and state court opinions generally

characterizing Linn's preemption holdings. Pet. Br. 8. This attempt utterly fails, however, because those courts either expressly recognized *Linn*'s actual harm requirement, or were decided wholly on other grounds. *See Box Tree South, Ltd. v. Bitterman*, 873 F. Supp. 833, 841 (S.D.N.Y. 1995)(recognizing that that this Court held that the NLRA "does preempt a state's defamation law to the extent that state law would otherwise provide a remedy in such cases when malice *and actual injury* are not proven"(emphasis supplied)); *Metheney v. Monarch Rubber Co.*, 43 F. Supp. 2d. 588, 592 (S.D. W. Va. 1999) ("[T]he Supreme Court limited the state defamation action to 'those instances in which the complainant can show that the defamatory statements were circulated with malice *and caused him damage*"(emphasis supplied)); *Briggs & Stratton Corp. v. National Catholic Reporter Publishing Co.*, 978 F. Supp. 1195, 1199 (E.D. Wis. 1997) (denying motion to dismiss state defamation claim because Linn did not "extend protection to third parties unrelated to a purported labor dispute"). Petitioner's appeal to state court authority is similarly unavailing. *See Tosti v. Ayik*, 476 N.E.2d 928, 938 (Mass. 1984)(holding that defamation plaintiff in a labor dispute "is entitled only to fair compensation for his *actual* damages . . . ." (emphasis supplied)).

2. The First Circuit did not require Intercity to prove special pecuniary damages.

The Petition argues that the First Circuit erroneously "required the targeted victim of malicious libels to prove special pecuniary losses . . . ." Pet. Br. 10-15. (initial caps adjusted). That argument misreads the appeal court's opinion. The appeal court specifically noted that the proof of harm required by *Linn* could include "general injury to reputation, consequent mental suffering, alienation of associates," *or* "specific items of pecuniary loss." Pet. App. 14 (quoting *Linn*). The court also noted, however, that "Intercity offered no more than a scintilla of evidence to prove losses stemming from diminished

reputation." Pet. App. 15. The appeals court therefore agreed with the district court that the quantum of Intercity's proof of harm aside from "specific items of pecuniary loss" was insufficient as a matter of law.

Rather, Intercity relied on evidence of damages apart from reputation to meet *Linn*'s actual harm requirement: the loss of two janitorial contracts. The losses of these contracts were "specific items of pecuniary loss" under *Linn*, and therefore among the kinds of losses that would meet *Linn*'s harm requirement. Intercity presented "no evidence," however, to prove those losses were caused by any libels. Pet. App. 15.

Thus, the First Circuit Court of Appeals did not require Intercity to prove special or pecuniary damages. Under the court's decision, general injury to reputation would have sufficed to meet *Linn*'s harm requirement. Intercity simply failed to produce sufficient evidence of any such harm. Once Intercity undertook to prove specific items of pecuniary loss, the burden was clearly on it also to prove causation for these losses. Intercity having failed to do so, the district court and appeals court properly found Intercity's claim preempted under *Linn*.

3. The First Circuit properly denied Intercity punitive damages because Intercity failed to prove any compensable harm.

The Petition argues erroneously that presumed damages to reputation under state law should be sufficient to meet the "compensable harm" requirement under *Linn* that is a prerequisite to punitive damages. Pet. Br. 15-17. First, that result would be directly contrary to *Linn*. 383 U.S. at 65-66 (equating actual harm and compensable harm). Second, creating such an exception to *Linn*'s basic holding would have the anomalous consequence that a claim preempted by federal law for lack of any actual harm could yet proceed to a jury for punitive damages under state law. Self evidently, such a result would eviscerate *Linn* and fundamentally undercut this Court's

well reasoned preemption jurisprudence under *Garmon*. Justice Black, dissenting to the narrow exception which *Linn* created to *Garmon* preemption, captured the danger of such a result with typical eloquence:

> The object of the National Labor Relations Act was to bring about agreements by collective bargaining, not to add fuel to the fire by encouraging libel suits with their inevitable irritations and dispute-prolonging tendencies. Yet it is difficult to conceive of an element more certain to create irritations guaranteed to prevent fruitful collective bargaining discussions than the threat or presence of a large monetary judgment gained in a libel suit generating anger and a desire for vengeance on the part of one or the other of the bargaining parties. I think, therefore, that libel suits are not only "arguably" but inevitably in conflict with the basic purpose of the Act to settle disputes peaceably—not to aggravate them, but to end them.

Id. at 68 (Black, J., dissenting).

To best implement the NLRA and *Linn*, this Court should now help the parties end this libel dispute by denying Intercity's petition for a writ of *certiorari*.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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